DOCKET

PROCEEDINGS AND ORDERS DATE: 111984

CASE NBR 83-1-06759 CSX
SHORT TITLE Moran, Betty DOCKETED: May 21 1984
VERSUS Ohio

Date	Proceedings and Orders
May 21 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 13 1984	Brief of respondent Ohio in opposition filed.
Jun 21 1984	DISTRIBUTED. September 24, 1984
Oct 1 1984	REDISTRIBUTED. October 5, 1984
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 29 1984	Petition DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

****

1PP

PETITION FOR WRIT OF CERTIORARI

(2)

NO. 83-6759

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ORIGINAL

BETTY MORAN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

RECEIVED
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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Betty Moran, moves this Court for an order permitting her to proceed in this Court in forma pauperis with her petition for writ of certiorari to review the judgment and final order of the Court of Appeals for the Eighth District of Ohio. The petitioner's separate affidavit in support of this motion is attached hereto.

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131 PP

IN THE UNITED STATES SUPREME COURT

BETTY MORAN

vs. NO. _____

STATE OF OHIO

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, Betty Moran, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are set forth in the Petition for Writ which has already been forwarded to the court. These we incorporate by reference.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No.

   Date of last employment: April 1967

   Amount of salary and wages per month which you received: NONE

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

3. Do you own any cash or checking or savings accounts?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Angela Moran Daughter

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Betty Moran
BETTY MORAN

SUBSCRIBED AND SWORN TO before me this 12 day of May, 19 84.

James R Willis
NOTARY PUBLIC

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BETTY MORAN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

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QUESTIONS PRESENTED

I

Whether due process is denied when the Court charges the jury, that to prevail on a plea of self-defense the accused was required to, in effect, prove herself not guilty.

II

Whether due process is denied, when a jury is instructed that as a prerequisite to even raising the defense of self-defense, the accused has to establish that the decedent was the aggressor, which instruction effectively dilutes the prosecution's burden of proving all the elements of the offenses charged.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BETTY MORAN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

To the Honorable, the Chief Justice and Associate Justices of
The Supreme Court of the United States:

The petitioner, Betty Moran, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on March 21, 1984 when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B" in the Appendix to this Petition.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C".

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STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on March 21, 1984. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

STATEMENT OF THE CASE [1/]

The undisputed facts show, our Petitioner, Betty Moran shot and killed her husband. According to the coroner "the man had been shot a number of times and died as a result thereof" (R 165). Also, the coroner, agreed the decedent "could very well have been highly intoxicated at the point when he was shot" (R 165).

Various witnesses, including Richard Rohn, John Martin and Gil Taylor, testified to facts showing their involvement with the movement of the decedent's body from the location where he was shot and died to Pennsylvania where he was found. None of these witnesses, however, were present when the actual killing took place. The same is true of Detectives Hicks and Kuntz. The officers became involved in this investigation when they met with Rohn who told them there was a body in the trailer or camper on the premises of B & W Towing Company. The towing company was owned and operated by Betty Moran and her husband (R 100). Both were also involved in the interview with Betty Moran by the police during which she made her statement (R 115). This statement, which was read to the jury (R 127), dramatically showed that Betty Moran shot her husband in the midst of a family quarrel over money (R 129-131). She explained to the police that the decedent demanded she give him the money she had gotten together to pay the bills. If she didn't have the money, he told her, by the time he woke up from a nap he was going to seriously harm her (R 131). It was following this serious threat that she picked up his gun and started shooting (R 132).

1/ References to the transcript of proceedings will be designated by the prefix "R".

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II

For her defense Betty Moran called a number of witnesses who revealed witnessing various patterns of abuse to which she was subjected in their presence.

Indeed in developing the legitimacy of her fears and belief that the decedent fully intended to inflict death or great bodily harm on her if she did not have the money he sought from her, the defense evidence included the testimony of:

(1) John Parker a longtime friend of the decedent (R 184). According to Parker he never knew the decedent not to carry a gun (ibid). Parker was there the night before Moran was shot. He was on the lot of the towing company because he "had some personal business with him" (R 186). When "Betty and her smallest kid pulled up in the yard ... he said 'I'm going to end up killing her and her mother one of these goddamn times." (R 186). This witness repeated that he had seen Willie Moran pull a pistol on several people (R 188-189). And, during 1981, he saw Willie physically abuse Betty "four or five times" (R 189).

As specifically put by the witness he saw the decedent "hit her, kick her ass" (R 189).

(2) Donald Tatum, one of the tow truck drivers, recalled seeing a confrontation between Betty Moran and the decedent in the office of the towing company (R 198). Here the witness related:

> A. Okay. When I came in the office I heard, you know, cursing, swearing. Okay? And, you can see through the office, as you walk in, you can see through the glass, and he was, you know -- had her by the neck, by the throat, and he was hitting --
>
> Q. With what?
>
> A. With a gun. Okay.
>
> Q. All right. Did you say anything?
>
> A. Yes.
>
> Q. What did you say?
>
> A. I said, "What are you doing?" And he looked at me. I mean, I didn't

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> want --I didn't know what his state of mind was. I didn't want to jump in and endanger myself, too. So I said, "What are you doing," and I looked at him, and he had her, and he looked at me, and he say, "You son of" -- you know, he swear at me.
>
> Is it all right to say it?
>
> Q. Yes. What did he say?
>
> A. "You son-of-a-bitch." And, I looked at him, and he just pushed me aside, and I was coming in, and he pushed me aside, and he walked out, and I looked at her, and I said, "Are you all right?" She was holding the back of her head, like this, I said, "Are you all right?" She said, "Yes, I'm all right." I said, "Are you sure? Do you want to go to the hospital, or something?" She said, "No. I'm fine. I'm fine." I said, "Okay." (R 200-201.)

(3) Still another witness was Fred Plotts, who likewise was an employee of the Towing company (R 202). This witness recalled seeing Willie Moran "hit her and knocked her off the chair and, then, kicked her." He was also "cussing her and calling her all kinds of names" (R 205).

(4) Dorothy Warren, the defendant's mother witnessed a significant segment of the arguments that precipitated the ultimate confrontation involved in this case. Here she testified:

> Q. Tell us everything that happened.
>
> A. That morning Betty and I was in the office, and he had been out in the yard, and he come back in, and out of a clear blue sky, he gets to fussing and arguing about money and telling Betty he want money, and, if she didn't get the money for him, he didn't care how she get it. He said, "Your Mammy can get it if you don't." Well, he had a pistol -- he always kept a pistol on him. He threatened her and I to shoot us both, and, I told him I didn't have no money to give him. But that is all the argument was about: money, money, money." (R 267-268).
>
> * * *
>
> A. Monday -- it was either Monday or Tuesday of that same week he was

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arguing in the office, and, then, he went to his camper, and he called, so she went into the camper. So, she was in the camper, and you could hear this loud noise, but I really didn't know what was going on, so, anyway, I wanted some ice water, and the refrigerator was in the camper, and I went in there like I always do to get me some ice water, and he had -- he had her down on the -- he done hit her and knocked her on the floor, and I seen him take his feet and was kicking her, and, when he started punching her, I asked him why he was doing that. I said, "What do you want to do? Kill her?" I said, "She ain't done nothing." He told me, "Yes." I told him no, I didn't think he would kill her.

So, then, he had got where he cussed me, and I was arguing back at him until he just walked on out, and that's when she got up.

The next day, all up and down and all around she was black and blue from kicks and hits.

Q. All right.

Did you ever see him hit her?

A. Yes; I seen him hit her.

* * *

Q. Did you ever see Willie with a gun?

A. Yes; all the time.

* * *

Q. Did you ever see him without a gun?

A. Once in a while he'd go out in the yard. If he would go out the front, he wouldn't have it, but when he come back in, he would strap it on him again.

(5) Still another defense witness was Gill Taylor, who had worked for the company for about a year (R 279). He too had seen Willie Moran jump on Betty Moran. He "punched her, and kicked her, and beat her" (R 280). This happened on more than one occasion. This witness recalled that when interviewed by the police he told them, as well, that he had seen Willie jump on Betty (R 286).

In testifying in her own defense, Betty Moran revealed the details of a very stormy marriage (R 213). Her testimony

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showed that in 1981 they were operating a towing company that averaged 8-10 employees (R 214) and four trucks (R 215).

Her husband had "five handguns," and "four shotguns or rifles" on the business premises (R 219). He also had 12 guns at their home (R 219). And, she testified, as had the witness Parker, that Willie "carried a gun nearly everyday unless he was washing or laying down" (R 220). And, she confirmed, what was in her statement, that Willie had put the knot on her head that she showed them (R 221). This he did "with the butt of the gun" he hit her with (R 221).

In further developing her rationale, she testified that he told her: "you know I am going to kill you and I'm going to kill your mother, too" (R 224). This brings us to the critical phase of her evidence. Here she testified:

"Then he came up and asked me was I going to get the money. He said I had taken his money and paid my mother's house off. He said I gave it to men; I gave it to women. He just kept going on and on.

I turned around, and I told him I was so tired of hearing this, I said, "Whatever you're going to do, I wish you would do it, because I'm miserable."

The more I tried to tell him, he just kept going off and on. He said, "I'll tell you what. You better have my money, because if you don't, when I get up I'm going to kill you and your mammy."

Q. When he told you that he would kill you and your mammy, did you believe him?

A. Yes, I did.

Q. After he told you that, what did you do?

A. I asked him where was I going to get the money. He said he didn't know. He tell me he didn't feel well, that his chest was hurting. He asked me to fix him a toddy with some whiskey and lemon and honey, and I fixed it for him. He went in to lay down and, when he went in to lay down, I went in a little while after that, and he started asking me did I get his money.

I said, "Where am I going to get that kind of money from to give you?"

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He told me again, "I'll kill you."

There's a little stand sitting by the bed, and he had placed his pistol there. He said, "You better have my money or I'll blow your damn brains out."

He said, "Either you go get the money or else you won't be here."

Q. Now, when he told you that, did you believe him?

A. Yes.

Q. What did you believe?

A. I believed he would.

Q. Believed he would what?

A. Would kill me, because he had got that way. A couple of days before that he got upset with me because no films was in the camera. He threw the camera at me. It hit here, knocked the lamp off the desk.

Q. Now, what did you do when he told you that he was going to kill you and your mother if you didn't get that money, and you believed him, what did you do?

A. I went back in the office. I did make one phone call to a friend of mine, Don Gibson, to see if he had some money he would let me have. He was a friend of both of ours. He said he didn't have it.

MR. NASO: I'm sorry. Would you keep your voice up ma'am?

A. I said he was a friend of both of ours. He said he didn't have the money.

I sit in the office, and I was trying to figure out where I was going to get this money from, because I had no way or nobody to turn to to get it.

Q. And, what did you do then?

A. I got up, and I went back in the camper, and he was laying there, and I just couldn't figure out where I was going to get the money, and the gun was there, and, all I can think about was when he got up he was going to kill me. I had these kids at home, and I just couldn't let him do it.

Q. All right. What did you do?

A. I just picked up the gun and started shooting. (R 224-227).

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ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Some of the arguments in this Petition have sought to anticipate a resolution of the question left unanswered by the Engle v. Isaac decision. Our hope was that we will have accurately predicted the Supreme Court's response to the central issue in this case. The Engle decision, of course, was based in its critical aspects on the fact that the individuals involved in that case had "simply challenged the correctness of the self-defense instructions under Ohio Law". Engle v. Isaac, 456 U.S. 107 (1982).

While the Engle opinion was so restricted, this Court made certain points that clearly portends the impending doom of the indefensible position taken by Ohio's various courts to the effect that a State can make it a crime to kill in self-defense. As such surely must be the view of those Courts if the prosecution is not required to prove the lack of self-defense in these circumstances.

Here we refer to this Court's specific reference to the fact that most courts have concluded, contrary to the position taken by the Ohio Courts below that "due process commands the prosecution to prove absence of self-defense if that defense negates [as it does here] an element ... of the charged crime" (id., at 122). Indeed, in Engle, this Court highlighted, in support of its indicated thesis, several cases in particular as being most significant and compelling. Here we refer to Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981). Tennon is most instructive on this point because it is actually an explication of Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980). It is this circumstance that makes it critical for this Court to examine the position taken in the Courts below on the fundamental issues involved in this case.

Since this Court has fully recognized that the question raised by this Petitioner is actually an open one (Engle, 456 U.S., at 122), a position more recently adopted by the Sixth Circuit in Melchior v. Jago, 723 F.2d 486, 492 (6th Cir. 1983), surely it is time for this court to meet this issue head on.

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I

Due Process Is Denied When The Court Charges The Jury That To Prevail On A Plea Of Self-Defense The Accused Was Required To, In Effect, Prove Herself Not Guilty.

The provisions of R.C. of Ohio, §2901.05 (A), to the contrary notwithstanding, due process is violated when a trial Court instructs the jury that the defendant must prove themselves to be innocent of the charges against them.

In this case, the trial judge expressly and unequivocally instructed the jury, as our statute §2901.05 directs, that the burden of proof was on the appellant to prove she had acted in self-defense. Here, the Record specifically shows the jury was told by the Judge that "the burden of proving the defense of self-defense is upon the defendant. She must establish such defense by a preponderance of the evidence" (R 307). This instruction was specifically objected to (R 324-325).

On this specific point, we start our analysis with the holding in In Re Winship, 397 U.S. 358 (1970). This case verifies the constitutional parameters as to the allocation of the burden of proof. It has been on the basis of our analysis of Winship and its lineal descendant (Mullaney v. Wilbur, 421 U.S. 684 [1975]) that, despite the position expressed by this Court in countless other cases dealing with this issue, we remained convinced this Court's reliance on Patterson v. New York, 432 U.S. 197 (1977), is sorely misplaced. In any event, the contention as raised is not merely to preserve the point. For it could very well be that by the time this appeal is reached for a decision further light will have been shed on the issue in some of the cases now awaiting the Supreme Court's disposition of Issac v. Engle.

In any event, for our part, despite serious flaws in the expressed rationale this court seems rather firmly committed

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to the view that Patterson v. New York, 432 U.S. 197 (1977), validates the jury instruction that an accused who relies on the defense of self-defense must prove himself not guilty. At least this much is certain this court has yet to specifically respond to various specific arguments (made in a number of cases) that contend the court has simply misread and misapplied Patterson. Because we are thoroughly convinced this is so, it is at least possible the following variation of these various arguments will be persuasive this time.

Here, we start with the fact that in Mullaney v. Wilbur, 421 U.S. 684, at 686 (1975), the point was made that the "jury [in that case] had been instructed...that if the prosecution established that the homicide was both intentional and unlawful, malice was to be conclusively implied unless the defendant proved...he acted in the heat of passion on sudden provocation." (Emphasis added.) And, the Court credited the Connecticut Supreme Court's conclusion that murder and manslaughter were "different degrees of the single generic offense of felonious homicide" (id., at 684).

In Patterson, a New York statute had provided a gratuitous defense to an intentional killing, which required a defendant to show he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation and excuse" (id., at 198). A killing "under [such] circumstances... [did] not constitute murder because... [done] under the influence of extreme emotional disturbance," which was in turn defined by a New York statute as manslaughter. Significant here, the New York Court of Appeals had originally held there was no shifting of the burden of proof in requiring the accused to prove his crime was manslaughter -- instead of murder. This was said to be so because to maintain such defense, the accused was not required to disprove any fact essential to the offense charged. So postured, the affirmative defense made in mitigation bore no direct relationship to any element of the crime of murder.

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It was this cogent analysis that lead the United States Supreme Court to conclude (and this is the critical point being that counsels feeling has been consistently ignored by this Court) that:

> "If the State...chooses to recognize a factor that mitigates the degree of or punishment, the State may assure itself that fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not [the court stated] require the State to prove its nonexistences in each case in which the fact is put in issue...." Id., at 207.

The above analysis shows The Court, in Patterson, was only dealing with a defense that mitigated the severity of the charged offense. Stated another way, there was no contention in Patterson that the killing was lawful. By way of contrast whenever self-defense is the issue, the contention is made that the killing was lawful. Simply put then, when self-defense is raised, the accused does not seek, in the words of Patterson, to demonstrate "a factor that mitigates the degree of criminality or punishment" (id., at 207). And, just as surely, when self-defense is raised (contrary to the situation in Patterson), the defense being raised bears a direct relationship to one of the elements of the crime charged -- that is, that the killing was unlawful.

The upshot of the combined effect of Mullaney and Patterson, both supra, is that while the State can require an accused to prove facts that would mitigate the gravity of his offense; the State simply cannot require an accused to prove himself not guilty. Yet, such is the unavoidable effect of an instruction that says an acccused is innocent if he proves he acted in self-defense. This point gains further momentum when one fully realizes that under the charge assailed here when the evidence is in equipose on the issue of self-defense, a conviction would be required.

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Essentially then, the arguments relied on by the State distill into an assertion that the arbitrary misinterpretation given by our Court (and other Ohio Courts) to R.C. of Ohio, §2901.05(A) and to Patterson is conclusive on the issue. It had been our hope that by the time this case was reached in the Ohio Supreme Court the arguments made by petitioner on these points would have to be credited in a determinative way. In any event, the determination by the Ohio Supreme Court not to review this case simply does not give sacrosanctity to the reasoning patterns that lead to such conclusions.

Again, and in all deference to Courts below, or at least to those members against whom our criticisms are being directed, we consider (on the self-defense instruction issue) the underlying fallacy of their position to be bottomed on the indefensible assumption that the Patterson v. New York decision authorizes a State to require an accused to prove he acted in self-defense. Or, stated differently, to prove his conduct was not unlawful. Aside from the more obvious fact that Patterson was not a self-defense case, a careful reading of Patterson shows it has to be tortured to accommodate a self-defense case. And, only then, by those who remain oblivious to certain rather precise language in the Patterson opinion itself. For it was here that the Court stated, in clear and unambiguous language, that:

> "[I]t is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id., at 201-202 (citing Speiser v. Randall, 357 U.S. 513, 523 (Emphasis Supplied.)

Since the Patterson Court did not define what those limits were, the decision can only be construed as holding there is no due process violation in convicting a defendant of

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murder who just as likely (or not) was acting under extreme emotional disturbance, because extreme emotional distress was not an element of the crime of murder. This being so Patterson can only be tortured to reach situations where the truth of the defense perforce negates an element of the crime.

Here too, it should be noted in this case, as it surely will be so concluded in some other case, that it is not even a subtle problem that emerges when the given self-defense instruction is related to the significant parallelism the instruction bears to the elements of the manslaughter offense itself. The point here being the jury could very well have concluded both that the elements of manslaughter were proven beyond a reasonable doubt. And, they could have concluded that self-defense was proven by a preponderance of the evidence. Since a jury would be required to convict under the given instruction if this had occurred, this circumstance makes it even clearer that the problems in this area will only be corrected when our courts recognize it is due process that requires the State prove a killing was unlawful and not in self-defense.

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II

Due Process Is Denied When A Jury Is Instructed That As A Prerequisite To Even Raising The Defense Of Self-Defense, The Accused Has To Establish That The Decedent Was The Aggressor, Which Instruction Effectively Dilutes The Prosecution's Burden Of Proving All The Elements Of The Offenses Charged.

The court instructed the jury that "the defendant must establish that the other party was the aggressor and that the defendant did not herself provoke and cause the death" (R 306). This charge too was specifically objected to (R 324-325) and for the right reasons (ibid). Simply put, the assailed language translates into telling the jury self-defense is never available to an aggressor. And, it implicitly places the burden on the defendant to prove the existence of facts and circumstances justifying the use of force in self-defense. Stated another way, the instruction is at least misleading in that it is so obviously capable of being read as placing on the accused the burden of proving, by some unknown quantuum of proof, that she was not the aggressor as a prerequisite to his even raising the defense of self-defense.

Also, and apart from the fact that the given self-defense instructions did not place the burden on the State to prove the lack of self-defense, as it should have, the above-quoted platitude served no useful purpose. In short, this particular charge unnecessarily created far too serious a risk that the jury would think and believe the State's burden of proof (--that is, that the death was unlawfully caused) was sustained by proof of the killing itself unless Betty Moran actually proved the decedent was the aggressor.

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Again, for what it is worth, self-defense is based on the concept of justification. An act that is legally justified is not unlawful. Thus, it follows that even though Mullaney v. Wilbur, 421 U.S. 684 (1975), expressly sanctioned requiring an accused to produce "some evidence" bearing on self-defense, Mullaney can only be read as requiring the prosecution to ultimately prove the lack of self-defense beyond a reasonable doubt. 421 U.S., at 701 n.28 and 702 nn. 30 and 31. Also see Wynn v. Mahoney, 600 F.2d 448 (4th Cir. 1979) and Webster v. Engle, 721 F.2d 566 (6th Cir. 1983).

Since the jury instructions given in this case on self-defense offended the above principle, these convictions must be reversed.

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CONCLUSION

The most critical issues in this case can only be resolved on the basis of an analysis that starts with the holding in In Re Winship, 397 U.S. 358 (1970), a case that solidifies the constitutional parameters as to the allocation of the burden of proof. In this regard, it should be noted that, unlike the situation in Engle v. Isaac, supra, the correctness of the self-defense instructions in our case was not simply challenged on the basis of Ohio law. Rather, it was vigorously contended the given jury instructions offended due process.

This case then furnishes the Court with a rather apt opportunity to deal specifically with the question left unanswered, despite being classified as "at least a plausible constitutional claim," in Engle. Indeed, although phrased slightly differently in this Brief, the question avoided in Engle -- that is, "whether, under Ohio Law, placing the burden of proving ... self-defense upon the defendant violates the defendant's due process right to have the State to prove each essential element of the crime beyond a reasonable doubt" (456 U.S., at n.25) is truly being brought before this Court by this cause with all its vigor -- including a history of rejection by a majority of this Court's members.

What makes this case, particularly the self-defense instruction issue as postured herein, all the more critical is the extreme cloud that has been generated in the wake of Engle over countless convictions from this County (and possibly elsewhere). This circumstance will surely continue to occur, in this County particularly, because jurors are routinely being told that for an accused to prevail on the theory of self-defense, he (or she) must, in effect, prove themselves not guilty. Of course, a prompt resolution of the "plausible constitutional question" referred to by the Court in Engle,

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at 797, would have more easily rectified the wrong done Betty Moran by the instructions in this case. Hopefully, this Court will, in any event, reduce the number of cases that will ultimately have to be reversed by recogitating its position on the efficacy of the challenged charges given in this case.

In any event, it would be incongruous to a fault for this Court to overlook the necessity for again factoring in its analysis the presence of the conflicting decisions of courts that have considered the issue as to whether due process requires the prosecution to prove its lack of self-defense.

For all of these reasons this case should be reviewed.

Respectfully submitted,

James R. Willis

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 18th day of May, 1984.

James R. Willis

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

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BCS

Baldwin Supreme, Publishers, Springfield, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 84 TERM
To wit: March 21, 1984

State of Ohio,
Appellee,

vs.

Betty Moran,
Appellant.

No. 84-8
MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
for CUYAHOGA *County*

It is ordered by the Court that this motion is overruled.

FOR YOUR INFORMATION ONLY NOT FOR FILING

COSTS:

Motion Fee, $20.00, paid by Willis

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

Clerk

Deputy

BEST AVAILABLE COPY

BCI-18A

Reserve Business, Publishers, Brunswick, Ohio

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 84 *TERM*

To wit: March 21, 1984

State of Ohio,

Appellee,

vs.

Betty Moran,

Appellant.

No. 84-8

APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA *County*

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA *County for entry.*

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

BEST AVAILABLE COPY

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 45879

STATE OF OHIO

Plaintiff-Appellee

vs.

BETTY MORAN

Defendant-Appellant

JOURNAL ENTRY
and
OPINION

DATE OF ANNOUNCEMENT OF DECISION: OCT 27 1983

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court Case No. Cr. 164,766

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee: John T. Corrigan, Esq.
Cuyahoga County Prosecutor
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant: James R. Willis, Esq.
Suite 1609, Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114

McMANAMON, ANN, J.:

Betty Moran, the defendant below, appeals her conviction on a charge of the aggravated murder (R.C. 2903.01), of her husband, Willie Moran.

It is undisputed that, on the afternoon of May 15, 1981, Betty Moran shot Willie Moran six or seven times after a lengthy and intermittent argument over some money the decedent believed his wife was witholding from him. (Tr. 225, 226, 227) Three days later the appellant learned that police were looking for her in connection with the slaying and she called them, directed them to the victim's body and confessed to the killing.

An indictment, trial in Common Pleas Court and conviction followed, from which Betty Moran appeals, enumerating three assignments of error:

I.

"THE COURT ERRED IN DENYING THE DEFENDANT'S VARIOUS MOTIONS FOR JUDGMENT OF ACQUITTAL AND HIS [sic] MOTION FOR A NEW TRIAL."

II.

"THE COURT ERRED IN CHARGING THE JURY, THAT TO PREVAIL ON A PLEA OF SELF-DEFENSE THE DEFENDANT WAS REQUIRED TO, IN EFFECT, PROVE HIMSLEF [sic] NOT GUILTY."

III.

"A DEFENDANT IS DENIED DUE PROCESS AS A CONSEQUENCE OF A JURY INSTRUCTION THAT AS A PREREQUISITE TO EVEN RAISING THE DEFENSE OF SELF-DEFENSE, SHE HAD TO ESTABLISH THAT THE DECEDENT WAS THE AGGRESSOR WHICH INSTRUCTION EFFECTIVELY DILUTED THE PROSECUTION'S BURDEN OF PROVING ALL THE ELEMENTS OF THE OFFENSES CHARGED."

I

In appellant's first assignment of error she argues that the trial court erred when it overruled her motions for acquittal and new trial because there was insufficient evidence produced by the state to demonstrate that appellant acted with prior calculation and design or that the killing of Willie Moran was unlawful.

This assignment of error is not well taken.

The standard to be applied by the trial court in ruling on a defendant's motion for acquittal can be found in State v. Bridgeman (1978), 55 Ohio St. 2d 261. The syllabus to that opinion states:

> "Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

After careful review of the record it is apparent to this court that appellant's motions were properly overruled as there was sufficient evidence presented on each element of the offense of aggravated murder to require submission of the matter to the jury and, later, to support the appellant's conviction.

The elements of aggravated murder are found in R.C. 2903.01(A) which provides:

> "(A) No person shall purposely, and with prior calculation and design, cause the death of another."

The Ohio Supreme Court has previously construed "prior calculation and design" in State v. Robbins (1979), 58 Ohio St. 2d 74 and State v. Cotton (1978), 56 Ohio St 2d 8, by stating:

> "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." Robbins, supra at 79, citing Cotton.

This court in State v. Jenkins (1976), 48 Ohio App. 2d 99, at 102 noted:

> "The trier of fact must look to the context in which the killing occurred to determine whether there was prior calculation and design. Some of the important factors to be examined and considered in deciding whether a homicide was committed with prior calculation and design include: whether the accused knew the victim prior to the crime, as opposed to a random meeting, and if the victim was known to him whether the relationship had been strained; whether thought and preparation were given by the accused to the weapon he used to kill and/or the site on which the homicide was to be committed as compared to no such thought or preparation; and whether the act was drawn out over a period of time as against an almost instantaneous eruption of events. These factors must be considered and weighed together and viewed under the totality of all circumstances of the homicide."

Betty Moran's statement to police three days after the shooting, which was read to the jury, was amplified on direct and cross-examination at trial. Appellant's pre-trial admissions and trial testimony demonstrated that she and the victim had an argument; that the victim allegedly threatened to kill her when he awakened if she did not have certain money he wanted; that she left his presence and attempted unsuccessfully to procure the money demanded; that she returned while the victim was sleeping, picked up the pistol she knew was available at his bedside; that she fired a shot; that she ignored his demand for an ambulance and then emptied the six shot revolver into the

victim's body; that she re-loaded it and fired two or three more times at him.

A trier of fact could reasonably infer from the evidence presented that the lapse of time between the Morans' final argument and the fatal shots fired by Betty Moran provided sufficient opportunity for appellant to plan the killing and for that planning to constitute prior calculation and design. In addition, the fact that appellant fired at least seven shots at the decedent could cause a jury to conclude reasonably that appellant acted with something more than "instantaneous deliberation" when she shot her husband. See Cotton, supra.

It would appear that the jury chose, on the basis of the evidence presented, to reject appellant's argument of self-defense and to find her guilty of aggravated murder.

It is well settled that the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact and a reviewing court will not reverse a judgment of conviction, where the record shows that a verdict of guilty was returned by a jury on sufficient evidence. State v. DeHass (1967), 10 Ohio St. 2d 230.

In this assignment of error appellant also argues that prior calculation and design cannot be established when there is evidence showing that, in the midst of an ongoing episode of serious confrontation, one party resorts to the use of deadly force in self-defense. It is her contention that the use of force in these circumstances cannot be considered to be unlawful, and therefore the charge of aggravated murder and murder should not have been submitted to the jury. We disagree and cite this court's opinion in Jenkins, supra, which stands for the proposition that the mere interposition by defendant of the affirmative defense of self-defense does not preclude

a jury from rejecting this defense and reasonably concluding that there was (or was not) prior calculation and design on defendant's part.

II and III

Appellant's second and third assignments of error relate to the trial court's charge to the jury on self-defense. We will consolidate them for consideration.

It is appellant's contention, the provisions of R.C. 2901.05 notwithstanding, that the court's instructions to the jury which placed the burden of proving the defense of self-defense upon the appellant, violated her due process rights by requiring appellant to prove herself innocent of the charges against her. In support of this proposition appellant relies on Patterson v. New York (1977), 432 U.S. 197 and Mullaney v. Wilbur (1975), 421 U.S. 684. But, as noted in Krzeminski v. E.P. Perini (C.A.6, 1980), 614 F.2d 121 (involving an Ohio prisoner's petition for habeas corpus relief alleging errors in the state trial judge's jury instructions):

> "*Patterson* makes it clear that so long as a jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant. *Patterson, supra;* ... What the state may not do is presume that an element of a crime exists as a result of given conduct and then place the burden of showing otherwise on the defendant.. *Mullaney v. Wilbur, supra.*" Id. at 123-124.

Revised Code 2901.05, in pertinent part provides as follows:

> "(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is

> upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.
>
> * * *
>
> "(C) As used in this section, an 'affirmative defense' is either of the following:
> "(1) A defense expressly designated as affirmative; (2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

The Supreme Court of Ohio has determined that self-defense is an affirmative defense. See State v. Poole (1973), 33 Ohio St. 2d 18. It has also held that:

> "To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger. State v. Robbins (1979), 58 Ohio St. 2d 74."

In order for appellant to establish the affirmative defense of self-defense it was imperative that she produce evidence to show that she was not the aggressor. (See Robbins, supra). The evidence introduced by the state clearly indicated that appellant left her husband's presence, after words were exchanged, and that, after a lapse of time, she returned to the room where her husband was lying abed and shot him in the back and chest. To maintain a defense of self-defense the court's instruction fairly required the appellant to show that she was not the aggressor, thus providing a justification for her admitted actions which was, if existent, peculiarly within her own knowledge as envisioned by R.C. 2901.05 (C)(2), and which, it was

her claim, motivated the killing.

The issues raised by appellant in her last two assignments of error have been considered by this court several times in the past. We have held, and continue to do so here, that the trial court's instruction which placed the burden of proving the affirmative defense of self-defense upon the appellant did not violate her right to due process. See State v. Jones (March 31, 1983), Cuyahoga App. No. 44983, unreported; State v. Henderson (Dec. 17, 1981), Cuyahoga App. No. 43489, unreported; State v. Walker (May 30, 1980), Cuyahoga App. No. 40586, unreported.

After reviewing the instructions given in the case at bar, we are satisfied that a proper rendition of Ohio law was given on the charge of self-defense and on the charge that the state was required to prove beyond a reasonable doubt each and every essential element of the crime charged.

Assignments of error II and III are not well taken.

Judgment of the Court of Common Pleas is affirmed.

EDITOR'S NOTE

PAGES 28 thru END WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PATTON, C. J.,

DAY, J., CONCUR.

JUDGE

ANN McMANAMON

RECEIVED FOR FILING
OCT 27 1983
CLERK

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see ment will be stamped to indicate ...ification at which time it eriod for review will begin to run.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 40664

State of Ohio

PLAINTIFF-APPELLEE

-vs-

Tarshis Britten

DEFENDANT-APPELLANT

APPEAL FROM

COMMON PLEAS COURT

No. CR-44430

JOURNAL ENTRY
AND
OPINION

DATE MAR 27 1980

PRYATEL, P.J.

The cause come on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

SEE OPINION, PRYATEL, P.J., INCORPORATED HEREIN BY REFERENCE.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the

Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CORRIGAN, J.

SILBERT, J.,* CONCUR

(*Silbert, J., retired of the Eighth Appellate District, sitting by assignment).

PRESIDING JUDGE AUGUST PRYATEL

For plaintiff-appellee: John T. Corrigan

For defendant-appellant: Walter S. Kobalka

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is not to be confused with journalization of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

(DK)

IN THE COURT OF APPEALS

CUYAHOGA COUNTY EIGHTH DISTRICT

NO. 40644

State of Ohio

Plaintiff-appellee

-vs-

Tarshis Britten

Defendant-appellant

OPINION

DATED MAR 27 1980

APPEARANCES:

For plaintiff-appellee:

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Cuyahoga County Prosecutor
8th Floor, Justice Center
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Cleveland, Ohio 44113

For defendant-appellant:

Walter S. Kobalka, Esquire
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140 Public Square
Cleveland, Ohio 44114

S Y L L A B U S

1. Criminal Rule 16(B)(1)(g), which provides that, upon request of the defendant, the court conduct an in camera inspection of the witness' written statement with counsel present and participating, means that counsel shall be present and available during such inspection in the event the court invites them to be heard on the existence or materiality of inconsistencies. However, the court need not permit counsel to examine the statement unless and until the court makes a determination that such inconsistencies exist and are material.

PRYATEL, P.J.

On December 5, 1978, defendant-appellant, Tarshis Britten [hereinafter appellant], was indicted in Cuyahoga County Common Pleas Court for (1) the aggravated murder of Theolis Butler, (2) the aggravated burglary of Mr. Butler's home, and (3) a felonious assault upon Gerald Osborne. The charges arose from an incident occurring in the early morning hours of November 6, 1978.

Appellant pleaded not guilty. He was tried before a jury which returned verdicts of, (1) not guilty of aggravated murder, but (2) guilty of the lesser included offense of murder, (3) not guilty of felonious assault upon Gerald Osborne, and (5) guilty of aggravated burglary. Appellant was sentenced accordingly.

The evidence adduced at trial consists of the following. Appellant and Theolis Butler had been incarcerated together at Mansfield Reformatory from 1974 through 1976 when Butler was released. (Tr. 323). In 1977, when appellant served his time, he resumed acquaintance with Butler who was a supplier of drugs and weapons while appellant was a drug user. (Tr. 324-327).

On Sunday, November 5, 1978, appellant was in possession of several "hot" coats. He brought them to Butler's home which Butler shared with his girlfriend, Barbara Jones, and her four children in the Cedar Central Housing Projects at 2403 Central Avenue, Apartment 302. (Tr. 75-76).

Butler purchased a coat from appellant, paying for it with $70 from Ms. Jones newly cashed welfare check. (Tr. 78). The two men and several others spent approximately one-half hour together "getting high." (Tr. 333). Appellant left. At approximately 8:00 p.m. appellant returned, engaged Butler in a lengthy conversation, again ingested drugs, and then left. (Tr. 79-80, 339, 341-343). At 11:00 p.m. appellant returned once more, this time to buy a pistol. He paid $100 for the weapon and then departed. (Tr. 350). Sometime thereafter, appellant discovered that the weapon would not function. (Tr. 352).[1/]

At approximately midnight, Barbara Jones and Theolis Butler were in bed watching television, smoking marijuana and drinking rum. (Tr. 80-81). At some point during the day, Butler had ingested various amphetamines as well as the drugs he had taken with appellant. (Tr. 32-34). Ms. Jones' four children were asleep in a second bedroom. She and Butler fell asleep. (Tr. 80-81). On November 6, 1978 at approximately 3:30 a.m. Ms. Jones awakened. The television programming had finished but the television was still on. In its light, she saw appellant standing in the doorway to her bedroom with a gun in one hand and a knife in the other. (Tr. 82). Appellant ordered her to

1/ The description of the activities of appellant and Butler and the purchase of the gun are taken from appellant's testimony in his defense as Ms. Jones, the only eyewitness to the events of November 6, 1978, could testify only that appellant was three times present in her home on November 5, 1978. She was in her bedroom the entire day and therefore could not testify as to events in the rest of the apartment. She was sleeping when appellant returned at 11:00 p.m. on November 5, 1978.

approach him. Before she did so, she tried unsuccessfully to awaken Butler who was sleeping naked next to her. She went to appellant who told her that Butler sold him a defective gun and that he (appellant) wanted his money returned. Appellant avowed, "I am going to get this nigger." (Tr. 83). Ms. Jones rifled through her dresser drawers both in the attempt to locate money and in the hope that her activity would awaken Theolis Butler. It did not. Appellant ordered Ms. Jones to return to bed which she did while still attempting to awaken Butler by nudging and kicking him. Appellant began searching Ms. Jones' bureau drawers. When his back was turned, Barbara Jones jumped out of bed, yelled Butler's name and fled to her children's bedroom. As she fled she saw Butler sit up in bed whereupon appellant stabbed him in the head with a long-bladed knife. (Tr. 84). Ms. Jones awakened her children, barricaded the door to their bedroom with a dresser and bed and ran to the window screaming for help. Appellant shot a hole through the door of the children's bedroom with a shotgun belonging to Butler. (Tr. 85).

Mr. Gerald Osborne, a private policeman, was escorting a female friend home through the projects when he heard a shot and saw a light in Ms. Jones' children's bedroom window, and heard Ms. Jones screaming for help. (Tr. 87). She saw Mr. Osborne and blurted that someone was trying to kill her and was stabbing Butler. In her haste she gave Osborne the wrong apartment number and when he was returning to obtain the correct one, he heard another shot.

He finally learned the correct apartment number from one of Ms. Jones' children whom she helped to leave via the bedroom window. (Tr. 178). As Osborne again was about to enter the apartment building, he saw a man, whom he identified as appellant, putting an object under his sweater. Identifying himself as a police officer, Osborne ordered the man to halt. The man fled; Osborne pursued and the man shot at him. (Tr. 79, 180). Osborne then went to Ms. Jones' apartment and coaxed her out of the bedroom. The police were summoned.

Private policeman Gerald Odvarka, Ms. Jones and Detective John Lavelle, the detective who arrived at the scene, all testified that Ms. Jones'-apartment was in disarray and that there was considerable blood in the bedroom, hallway and bathroom. From photographs of the scene of the murder, it is apparent that a violent struggle took place as the blood was smeared extensively on walls, floors and furniture. Butler's body, drenched with blood, was found on the bedroom floor. Three weapons were found under or beside the body. The coroner testified that Butler had been stabbed forty-five times; that four of the wounds could have been the cause of death, but that all the wounds contributed to death because of the enormous loss of blood. (Tr. 220-256, 23, 34, 72).

Appellant took the stand and testified as follows: Aggrieved because he had been sold a faulty weapon, he telephoned Butler to ask for his money back. Butler told

him to come over to discuss the matter. When appellant arrived at the Butler residence, the front door was "cracked" and Butler was standing inside, nude, with a pistol. (Tr. 355). Appellant believed Butler to be a dangerous man as he had been incarcerated in Mansfield for the crime of manslaughter.[2/] Nevertheless, appellant entered the apartment and began to argue with Butler who raised his pistol. Appellant slapped the pistol away causing it to discharge. The two began to fight. Appellant pulled a knife, stabbing Butler repeatedly while Butler was attempting to shoot appellant with various weapons. (Tr. 356) Appellant received minor injuries although he averred that he was defending himself from the man he stabbed forty-five time..

Appellant appeals the verdict, alleging twelve errors.

2/ Butler's nickname was "Man" to commemorate his crime and place of punishment.

Assignment of Error I:

I. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN REFUSING TO CHARGE THE JURY ON MANSLAUGHTER

Counsel for appellant argues that an instruction should have been given the jury vis a vis voluntary manslaughter. The trial court refused to give such a charge but charged the jury on aggravated murder, murder and self-defense. Appellant contends that the trial court erroneously failed to instruct the jury on voluntary manslaughter as the evidence supported such an instruction.

Revised Code Section 2903.03 provides:

> (A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.
>
> (B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree. (emphasis added).

It is well settled in Ohio that:

> One who inflicts a mortal wound in a sudden affray or in heat of blood or passion, without time for reflection or for passions to cool, is guilty of [voluntary manslaughter]. State v. Robinson (1954), 161 Ohio St. 213, Syl. 7.

See also, State v. Muscatello (1978), 55 Ohio St. 2d 201, State v. Muscatello (1977), 57 Ohio App. 2d 231; State v. Epler (1978, Cuy. Cty.) unreported decision number 37426; State v. Carter (1944), 75 Ohio App. 545; Larbo v. State (1934), 18 Ohio Law Abs. 145.

Where there is sufficient evidence of the circumstances of emotional stress, the trial court should instruct on voluntary manslaughter. Conversely, however, where the issue is not raised by sufficient evidence, such an instruction is improper. Muscatello, supra, at 251.

In the present case, an instruction on voluntary manslaughter is unwarranted. The state's case was one of murder at the very least, e.g., that appellant entered the Butler home and began stabbing Butler as soon as he awoke. However, appellant argues that he produced evidence that Butler was killed during mutual combat which entitled him to an instruction on voluntary manslaughter. Robinson, supra. We disagree. Appellant's evidence showed only that he entered the apartment, began to argue with Butler, who raised a gun which appellant slapped out of Butler's hand. According to appellant, he fell upon Butler and stabbed him repeatedly. We hold that there was no evidence in the record that appellant was incited to kill by reasonably sufficient serious provocation as required by R.C. §2903.03. Indeed, one can hardly institute an argument (that never materializes) and then use it to justify a request for a voluntary manslaughter charge. The trial court was correct in denying appellant's request for a voluntary manslaughter instruction.

Accordingly, assignment of error I is overruled.

II. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN REFUSING TO PERMIT APPELLANT TO INSPECT AND USE BARBARA JONES' PRIOR STATEMENT TO THE POLICE DURING APPELLANT'S CROSS-EXAMINATION OF BARBARA JONES.

At the close of cross-examination of Barbara Jones, defense counsel pursuant to Crim. R. 16(B)(1)(g) requesred an in camera inspection of a statement Ms. Jones had given the police the day after Butler was murdered. The court granted the request and reviewed the statement, while defense counsel and the prosecutor were present. The court did not permit either counsel to read the statement which is attached to the record as Court's Exhibit 1. The trial court determined that there were no material inconsistencies and denied defense counsel the use of the statement for cross-examination. (Tr. 136-139).

Appellant argues that the trial court erred in not permittin defense counsel to inspect the statement and that this error was prejudicial to appellant as there were substantial inconsistencies between the contents of that statement and the content of Ms. Jones' trial testimony.

The precise question raised by appellant is whether counsel must be allowed to inspect the statement prior to, and regardless of a determination by the trial court that that statement contains material inconsistencies. Appellant argues that this question must be answered affirmatively, and tha "participation" is synonomous with inspection.

Our research has disclosed no case law in Ohio on the precise issue before us. Prior to the adoption of the Criminal Rules, the court held in State v. White (1965), 15 Ohio St. 2d 147:

> 4. In a criminal case, the defendant has a right to an in camera inspection by the trial court, with counsel for the state and the defendant, to determine the existence of inconsistencies between the testimony of the prosecution's witnesses and their prior statements.

The court stated, in support of this holding:

> . . . In accord with federal procedure, many states do not require a preliminary showing of inconsistency between the contents of the statement and the testimony of the witness at the trial. Id., 225. Others require such a preliminary showing of inconsistency which is essentially impracticable if not impossible. If the defendant does not know of the existence of the evidence or the inconsistencies which it contains, he would not be able to request its production.
>
> There is, however, another alternative. The defense may request an in camera inspection by the court to determine the existence of any inconsistencies.
>
> By an in camera inspection, we mean a review by the court at which counsel for the state and counsel for the defense are present and participating. If the judge determines that inconsistencies exist between the testimony of the witness and his prior statement, and such inconsistencies are of so substantial a nature that the demands of a fair trial and due process require that the defense be permitted to cross-examine the witness as to such inconsistency, the statement should be released to defense counsel. Otherwise, defense counsel is bound under obligation of his oath to office as an attorney to erase from his mind, and never to use, any information received from the in camera inspection. Id. 157 (emphasis added).

It can be argued that the White court required that the court with counsel inspect the statement prior to the court's determination. Restricting that

participation is the admonition that counsel is "bound under obligation of his oath . . . to erase from his mind, and never to use, any information received from an in camera inspection."

As we pointed out, White was decided before the criminal rules were adopted. Criminal Rule 16(B)(1)(g) now establishes the procedure for in camera inspection of witnesses statements. That rule provides:

> (g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.
>
> If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.
>
> If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.
>
> Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

The procedure set forth in Crim. R. 16(B)(1)(g) is mandatory upon the trial court once an in camera inspection is requested. State v. Ellis (1975), 46 Ohio App. 2d 102.

The criminal rule telescopes and amends the White ruling. Ellis, supra at 105. Where the White syllabus held that "the defendant has a right to an in camera inspection by the trial court, with counsel . . .", the rule provides that "the court . . .

shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, . . ." To clear any doubt the rule specifies that where "the court determines the inconsistencies do not exist the statement shall not be given to the defense attorney . . ." This provision tightens the White decision and denies counsel the right to inspect the statement unless and until court's determination that inconsistencies do exist.

The requirement that defense counsel be "present and participating" during an in camera inspection of a witness' statement does not mean that defense counsel is entitled to inspect the statement before the court rules that inconsistencies exist. The obvious purpose of the rule is to give counsel the opportunity to use prior inconsistent statements which the prosecutor may be concealing, White, supra, while at the same time to deny counsel's access to that to which he is not entitled.

We construe the term "present and participating" to mean that the court must review the statement in the presence of counsel and that they be available for participation. For example, the court may note an inconsistency and allow counsel to argue whether the inconsistency is of minor significance or so substantial in nature that the demands of a fair trial and due process require that the defense be permitted to cross-examine the witness or, rather than excuse the jury, the court may expedite the trial by testing its recollection of witnesses' testimony against the recollection of counsel at the side-bar. In short, participation does not mean that counsel and the court both read

the statement. This conclusion is buttressed by the language in Crim. R. 16(B)(1)(g) that, in the event the court rules that inconsistencies do not exist, the statement shall not be given to defense counsel, and he "shall not be permitted to cross-examine or comment thereon." Nor need the rule require counsel to erase from his mind any information gained from the statement, (as the court held in White) for counsel now has nothing to erase.

Finally, we are faced with the collateral question of whether the trial court was correct in concluding that there were no materia inconsistencies between the written statement given by Ms. Jones to the police and her trial testimony. We have carefully reviewed that statement in light of her testimony and find that there are some discrepancies, but they are minor and do not reach so substantial a nature that the denial of a fair trial and due process are transgressed.

Accordingly, we overrule assignment of error II.

Assignment of Error III.

III. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN CHARGING THE JURY THAT APPELLANT HAD THE BURDEN OF PROVING SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

Under assignment of error III, appellant argues that Revised Code Section 2901.05(A) is unconstitutional because it places on a defendant the burden of proving an affirmative defense by a preponderance of the evidence. Appellant contends that R.C. §2901.05(A) requires a defendant to disprove an element of the crime with which he is charged as in Ohio "unlawfulness" is an implied element of every crime and any justifying defense renders the commission of an act lawful.

Appellant's argument is without merit.

Revised Code Section 2901.05(A) provides in its entirety:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

The elements of the crime with which appellant was charged; aggravated murder, are (1) causing the death of another, (2) purposefully, and (3) with prior calculation and design. R.C. §2903.01(A). The elements of the crime of which appellant was convicted; murder, are (1) causing the death of another, (2) purposefully.

The trial court charged the jury that the state must prove all the elements of a crime beyond a reasonable doubt before the jury could return a verdict of guilt. (Tr. 451). The court correctly explained "reasonable doubt," (Tr. 452) and defined and redefined the elements of both aggravated murder and murder. (Tr. 456, 463). Finally, the trial court gave the affirmative defense of self-defense and charged that appellant had to prove that defense by a preponderance of the evidence. Furthermore, the trial court instructed the jury that, even if appellant failed to carry his burden, the state still had to prove each element of any offense beyond a reasonable doubt before the jury could find appellant guilty of such an offense. (Tr. 461).

In State v. Robinson (1976), 47 Ohio St. 2d 103, at 110, the court stated:

> The obvious meaning of R.C. 2901.05(A) is that the state bears the burden of proof beyond a reasonable doubt through the trial, and that burden does not shift to the defendant.

Indeed, in State v. Abner (1978), 55 Ohio St. 2d 251, the Supreme Court held that "it is not error for a trial court to refuse a jury instruction that the state must prove beyond a reasonable doubt that the defendant did not act in self-defense."

In State v. Newell (Ct. App. Cuy. Cty. 1979), unreported decision number 40470, where Newell was charged with, admitted to, and was convicted of escape and possession of criminal tools and asserted the affirmative defense of duress, we said:

> In the instance case, the appellant admitted both his escape and possession of criminal tools. The state had sufficiently proved beyond a reasonable doubt each and every element of each of these crimes. The defendant asserted the defense of duress. As such, he raised a separate and distinct issue which, by statute, he was required to prove [by] a preponderance of the evidence. In [Patterson v. N.Y. (1977), 432 U.S. 197,] the United States Supreme Court reasoned that if New York chose to recognize a factor that mitigated the degree of criminality or punishment, then the state could assure itself of the existence of the mitigating factor by requiring that it be established by a preponderance of the evidence. Patterson, supra at 209. Similarly, the Ohio legislature has provided that every person is presumed innocent until proven guilty beyond a reasonable doubt by the state and at the same time allows for a defense to present affirmative defenses. Since defendant may present an affirmative defense (analogous to the mitigating factors present in Patterson, supra), the state has the authority to require him to prove that affirmative defense by a preponderance of the evidence.

Under the facts of the present case and the Ohio statutory scheme which requires the state to prove each element of a crime beyond a reasonable doubt, we hold that placing the burden of proving self-defense upon appellant by a preponderance of the evidence was not an unconstitutional denial of due process of law. We extend our holding in Newell, supra, that R.C. §2901.05(A) is constitutional by holding that it applies to self-defense no less than to duress.

Appellant did not deny that he purposely took the life of Theolis Butler. Indeed, appellant testified that Butler was a known killer and that he (appellant) knifed him to prevent Butler from killing appellant. In short, appellant admits that he perpetrated the killing, but he did so justifiably as he was

in fear and danger of losing his life. Appellant thus raised a separate and distinct issue with regard to his guilt or lack thereof. The state was required to prove each stated element of the crime beyond a reasonable doubt.

Accordingly, assignment of error III is overruled.

Assignment of Error IV.

IV. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN REFUSING TO GRANT APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 2, AGGRAVATED BURGLARY

Revised Code Section 2911.11 provides:

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

Appellant was convicted of aggravated burglary pursuant to the above code section. Under this assignment of error he challenges this conviction on the basis that the state failed to prove that (1) he had a deadly weapon on or about his person and (2) that he was trespassing in an occupied structure. In support of this contention appellant points out that Barbara Jones was asleep when he entered the apartment, and therefore, she could only testify that she did not give him

permission to enter. Appellant also argues that he testified that he did not have a gun when he came to the Butler apartment and that Ms. Jones saw him with one only after he had already entered. Therefore, there was no evidence that he had a weapon while he was trespassing.

Ms. Jones' testimony established that when she awakened and saw appellant in the doorway to her bedroom, Butler was asleep beside her, while her children were asleep in another room. It was 3:30 a.m. The inference properly can be drawn that appellant gained entrance to the apartment either by stealth or force by pushing open what appellant described as the "cracked" door. Certainly he was there without the permission of anyone with the legal authority to grant it.

Finally, when Barbara Jones saw appellant, he was in her apartment holding both a gun and a knife, while Butler was in heavy sleep. Appellant was clearly trespassing while in possession of a deadly weapon and dangerous ordnance.

We hold that the state introduced sufficient evidence to withstand a motion for directed verdict. Furthermore, the manifest weight of the evidence supports a verdict of guilty of aggravated burglary. State v. Dellass (1967), 10 Ohio St. 2d 230; State v. Axe (1928), 118 Ohio St. 514.

Accordingly, assignment of error IV is overruled.

Assignment of Error V:

V. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN CHARGING THE JURY IN VIOLATION OF STATE V. MUSCATELLO (1977), 57 OHIO APP. 2d 231.

Appellant argues that the trial court's charge to the jury implied that they were required unanimously to find appellant not guilty of aggravated murder before they could proceed to any consideration of the lesser included offense of murder and that this implication violated this court's holding in State v. Muscatello (1977), 57 Ohio App. 2d 231 that such an instruction was improper.

The above contention is well-taken. We find the court's instruction virtually identical to that given in Muscatello. However, we fail to perceive how appellant was prejudiced by the instruction. The fact is that he was convicted, not of the greater offense of aggravated murder, but of the lesser included offense of murder. Even if the jury wrongfully believed that they unanimously had to agree that appellant was not guilty of aggravated murder before proceeding in their deliberation, they still acquitted him of the greater crime. We hold the error to be harmless.

Accordingly, assignment of error V is overruled.

Assignment of Error VI:

VI. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN PERMITTING THE PROSECUTOR TO INFLAME AND MISLEAD THE JURY IN HIS CLOSING ARGUMENT

Counsel are permitted wide latitude in closing argument and whether that latitude is transgressed is in the first instance committed to the discretion of the trial court. State v. Bayless (1976), 48 Ohio St. 2d 73; State v. Pustore (1973), 35 Ohio App. 2d 305.

After careful review of the prosecutor's closing argument, this court holds that, while that argument is passionate, the trial court did not err in permitting the statements objected to by appellant. The prosecutor confined himself to comment on the evidence presented. His theory as expressed in his closing argument is supported by the evidence introduced by the state. Nowhere do we find argument based upon facts not in the record. Nowhere did the prosecutor express his own conviction as to guilt nor did he attempt to convince the jury to convict for the sake of society. We hold that the prosecutor's closing argument was within the bounds of propriety.

Accordingly, assignment of error VI is overruled.

Assignment of Error VII:

VII. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN REFUSING TO PERMIT APPELLANT TO PRESENT EVIDENCE CONCERNING, AND TO INQUIRE INTO, THEOLIS BUTLER'S PROPENSITY FOR VIOLENCE AND VIOLENT CHARACTER.

During cross-examination of Detective William Leppelmeier counsel for appellant repeatedly tried to elicit testimony to the effect that the victim, Butler, had been incarcerated in Mansfield Reformatory for manslaughter. The prosecutor objected to the line of questioning which objections were sustained. Appellant contends that this constituted reversible error as the victim's reputation and propensity for violence was relevant to the defense of self-defense.

Appellant is correct in his contention that proof of the dangerous character of his victim was material to his defense. McGary v. State (1931), 123 Ohio St. 196.

However, the record discloses that appellant was not precluded by the trial court from offering such proof. Appellant himself testified as to Butler's incarceration for manslaughter and his (appellant's) fear of Butler. Additionally, Detective Leppelmeier testified that, while he knew Butler had been in Mansfield, he did not know why. Appellant could have gained nothing from his inquiry of the detective had he been permitted to proceed.

Appellant has failed to demonstrate prejudice.

Accordingly, assignment of error VII is overruled.

Assignment of Error VIII:

VIII. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN PERMITTING THE JURY TO VIEW POLICE AND AUTOPSY PHOTOGRAPHS.

Appellant argues that the trial court erred in the admission of two sets of photographs of the body of Theolis Butler: (1) the autopsy photographs and (2) the photographs taken at the scene of the crime by police photographers. In substance, appellant contends that these photographs were not accurate representations of the body or scene of the murder and that their prejudicial nature outweighed their probative valu .

In State v. Woodards (1966), 6 Ohio St. 2d 14 at 25, the court held:

> The rule is well settled that photographs and color transparencies are not objectionable so long as they are properly identified, are relevant and competent and are accurate representations of the scene which they purport to portray. Indeed, photographs frequently convey information to the court and jury more accurately than words. Oliver v. State, 225 Ark. 809, 286 S. W. 2d 17; Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873.
>
> Although a photograph may be rendered inadmissible by its inflammatory nature, the mere fact that it is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury. People v. Brubaker, 53 Cal. 2d 37, 346 P. 2d 8; People v. Jenko, 410 Ill. 478, 102 N. E. 2d 783; Commonwealth v. Novak, 395 Pa. 199, 150 A. 2d 102.
>
> The real question is whether the probative value of such photographs is outweighed by the danger of prejudice to the defendant.

See also, State v. Hannah (1978), 54 Ohio St. 2d 84, at 88; State v. Rivers (1977), 50 Ohio App. 2d 177; State v. Lang (1976), 49 Ohio St. 2d 77, at 83.

The autopsy photographs were identified and described by the doctor who performed the autopsy, Dr. MarylynCebelin (Tr. 23-28). Dr. Cebelin stated that the body had been cleaned. However, these photgraphs accurately portrayed the wounds sustained by Butler without the vast quantity of blood which covered the body after death. The photographs were therefore both properly authenticated and were accurate representations of that which they purported to portray. Appellant objects to the fact that the photographs were exhibited to the jury prior to identification and authentication. In light of our holding that the photographs ultimately were properly authenticated, there was no prejudice to appellant in the procedure used in the the court below.

The photographs of the body at the scene of the murder were identified by Detective John Lavelle under whose direction they were taken. He testified that they accurately portrayed the scene of the murder. However, in State's Exhibits 10, 21, 22 and 23 the body had been moved from its position on its stomach so that it lay on its back. Detective Lavelle testified that this was done so as to photograph all of the wounds sustained. The rest of the photographs were taken while the body was in the position in which it was found. We find that all the

photographs were accurate representations of the scene they purported to portray as required by Woodards, supra. The simple fact that in four of the photographs the body had been turned does not affect the accuracy of the representation.

Nonetheless, appellant argues that these photographs were so inflamatory and prejudicial that they should have been excluded. There is no dispute that they are both horrendous and gruesome. A heinous murder was committed. However, that alone does not render them inadmissible. Woodards, supra. The photographs were relevant upon appellant's plea of not guilty, both to show the jury the nature of the crime committed and to disprove appellant's self-defense theory. Under the circumstances, we cannot say that the trial court abused its discretion in admitting these photographs.

Accordingly, assignment of error VIII is overruled.

Assignment of Error IX:

IX. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN PERMITTING HEARSAY TO BE ADMITTED INTO EVIDENCE.

Appellant objects to the admission of (1) Barbara Jones' testimony that no one gave appellant permission to enter her home and (2) Detective William Lavelle's testimony that he learned the name "Tarshis" from Barbara Jones and received a description of the murder at the scene of the killing. Appellant argues that this testimony was hearsay and therefore inadmissible.

Hearsay is defined as an extra-judicial statement offered to prove the truth of the matter asserted therein. State v. Lewis (1970), 22 Ohio St. 2d 125.

Barbara Jones' statement that neither she, nor anyone else, gave appellant permission to enter her home was offered to show that a trespass was committed; that neither she nor anyone else with the legal authority to do so gave consent. Ms. Jones was testifying to facts within her own knowledge as she knew her children were asleep in their bedrooms and Butler was asleep beside her. Thus, her statement is not hearsay.

Officer Lavelle's testimony that Barbara Jones told him the killer's name was "Tarshis" was simply telling the jury what she had previously testified was the name of the defendant. We fail to see the prejudice to appellant in the admission of the statement for several reasons: (1) Barbara Jones testified and

was fully subject to cross-examination, (2) Barbara Jones identified appellant as the man who murdered Butler, and (3) appellant's identity was not at issue as he admitted he killed Butler.

Accordingly, we overrule assignment of error IX.

Assignment of Error X:

X. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN REFUSING TO PERMIT APPELLANT TO INQUIRE INTO THE CRIMINAL RECORDS OF BARBARA JONES AND GERALD OSBORN

On cross-examination of Detective William Leppelmeier, counsel for appellant inquired if Gerald Osborne or Barbara Jones had criminal records. The trial court sustained objections to these questions (Tr. 276). Jones and Osborne had testified previously. At no time did counsel for appellant inquire of either witness as to a criminal record. Appellant argues that the refusal of the trial court to permit the questioning of Detective Leppelmeier with regard to any criminal record of Osborne and Jones was error.

We hold that appellant should have made inquiry of the witnesses themselves. The questioning of Detective Leppelmeier would have elicited hearsay and the court was therefore correct in sustaining the objections thereto.

Accordingly, assignment of error X is overruled.

Assignment of Error XI:

XI: THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN REFUSING TO PERMIT A JURY VIEW OF THE SCENE OF THE ARGUMENT AND KILLING.

Prior to trial appellant moved the court to permit a jury view of the scene of the murder of Theolis Butler. The court denied the request despite the prosecution's acquiescence therein. (Tr. 4-5). Appellant contends that the denial of his motion was error.

Revised Code Section 2945.16 provides:

> When it is proper for the jurors to have a view of the place at which a material fact occurred, the trial court may order them to be conducted in a body, under the charge of the sheriff or other officer, to such place, which shall be shown to them by a person designated by the court. While the jurors are absent on such view no person other than such officer and such person so appointed, shall speak to them on any subject connected with the trial. The accused has the right to attend such view by the jury, but may waive this right.
>
> The expense of such view as approved by the court shall be taxed as other costs in the case.

In State v. Montalvo (1974), 47 Ohio App. 2d 296, at 297, the court held:

> The question of a "jury view" is within the discretion of the trial court and a decision regarding such will not be disturbed on appeal unless an abuse of discretion is established.

See also, Calloway v. Maxwell, Warden (1965), 2 Ohio St. 2d 128.

We hold that the trial court did not abuse the discretion vested in it by refusing to permit a jury view. The trial testimony and exhibits adequately and fully depicted the

premises as they were the night of the murder. State v. Vaughn (Ct. App. Cuy. Cty. 1971) Unreported Decision Number 30441. State v. Hudson (Ct. App., Cuy. Cty. 1971), Unreported Decision Number 30442.

Accordingly, assignment of error XI is overruled.

XII. THE COURT ERRED AND COMMITTED REVERSIBLE ERROR IN PERMITTING THE STATE TO USE PRIOR PHOTOGRAPHIC IDENTIFICATIONS OF APPELLANT TO CORROBORATE ITS WITNESSES' TESTIMONY.

On direct examination of both Barbara Jones and Gerald Osborne, the prosecution asked whether the witnesses had viewed photographs in connection with the murder of Theolis Butler. The prosecutor further inquired if the witnesses had picked anyone from an array and introduced that array, including a photograph of appellant, into evidence. The witnesses responded that they had viewed photographs, had chosen appellant's photograph as that of Butler's killer and pointed out which photograph they had chosen. (Tr. 89-91, 187-188).

Appellant objects to this testimony alleging that this was an attempt to bolster the credibility of witnesses prior to an attack thereon.

Prior photographic identification is admissible in absence of an attack upon credibility only where identity of the perpetrator of a crime is at issue. R.C. §2945.55; State v. Breedlove (1971), 26 Ohio St. 2d 178; State v. Lancaster (1971), 25 Ohio St. 2d 83; State v. Schecter (1974), 47 Ohio App. 2d 113; Reed v. State (1918), 98 Ohio St 279.

In the present case this testimony was admissible upon appellant's plea of not guilty. Without a stipulation as to identification, the state had to place the appellant at the scene beyond a reasonable doubt. Further, in light of, (1) the definitenes: with which the witnesses identified appellant in court, (2) the

overwhelming evidence that appellant committed the crime, and (3) his admission and avoidance defense, we hold that the admission of the prior identification testimony and the photographs, even if erroneous, was harmless.

Accordingly, assignment of error XII is overruled.

We affirm.

CORRIGAN, J.
SILBERT, J.* CONCUR.
(*Silbert, J., retired of the Eighth Appellate District, sitting by assignment).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

Quarantined 7/27/81

NO. 42846

State of Ohio

APPELLEE

-vs-

Wealthy Johnson

APPELLANT

APPEAL FROM

COMMON PLEAS COURT

No. Cr. 53713

JOURNAL ENTRY
AND
OPINION

DATE JUL 16 1981

KRENZLER, J.:

This cause came on to be heard upon the pleadings and the ..... transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On March 19, 1980, defendant-appellant Wealthy Johnson, hereinafter referred to as appellant, was indicted for the offense of voluntary manslaughter as defined by R.C. 2903.04.

At her arraignment on April 15, 1980, appellant entered a plea of not guilty.

On July 29, 1980, appellant stood trial before a jury.

The evidence at trial indicated that on February 17, 1980, the appellant shot and killed her boyfriend, John Newsome, in their home at 3366 East 135th Street. The couple had lived at that location for

Appendix "B" (2)

two years. Appellant had known Newsome for eighteen years. Appellant admitted shooting Newsome, but asserted that she did so in self-defense.

The jury found appellant guilty of voluntary manslaughter as charged in the indictment. Appellant moved for a new trial. In an entry filed September 8, 1980, the trial court denied appellant's motion for a new trial and sentenced her to a term of 4 to 25 years of imprisonment in the Womens' Correctional Admission Center.

Appellant appeals the judgment and asserts a number of assignments of error for our consideration. The assignments of error and the facts relevant to each assignment now follow:

I. WHERE THE DEFENSE OBJECTS TO THE UNQUALIFIED ADMISSION OF OBVIOUS HEARSAY, WHICH EVIDENCE ALSO OFFENDS THE ACCUSED'S RIGHT OF CONFRONTATION, THE PROPONENT OF SUCH EVIDENCE (IF HE CONTENDS IT IS ADMISSIBLE AS AN EXCEPTION TO THE HEARSAY RULE AND IS SUFFICIENTLY RELIABLE TO SATISFY CONFRONTATION REQUIREMENTS) MUST ESTABLISH, AND THE COURT MUST MAKE, CERTAIN RELEVANT FINDINGS AS TO THE PRESENCE OF CERTAIN CONDITIONS PRECEDENT TO ITS ADMISSION.

In her first assignment of error, appellant asserts that the trial court erred in admitting evidence of statements made by the decedent-victim, John Newsome, after he was wounded. Appellant asserts that the trial court was required to expressly find that these statements by the victim qualified as dying declarations before permitting them into evidence. Appellant argues that the victim's statements did not qualify as dying declarations and were not admissible.

In the case at bar, the state presented a number of witnesses who indicated that the badly wounded victim stated that his girlfriend (i.e., the appellant), had shot him. Illustrative of this type of testimony was the testimony of Charles Rini, Patricia Henegan, and David Sabo. 1/

1/ Also see the testimony of Dr. Kennar, Ellen Celebrezze, Officer Walter Skropys, and Detective Ernest Rowell. (3)

Charles Rini, an Emergency Medical Service Technician, testified that on February 17, 1980, he went to 3366 East 135th Street in response to a telephone call that a male had been shot. Upon his arrival at that address, Rini found the wounded victim. Rini provided immediate treatment for the victim's bleeding and extremely low blood pressure. As the victim was being treated, he stated that "My girlfriend shot me and went to Detroit." He then asked "How bad am I?"

Patricia Henegan, a registered nurse at St. Luke's Hospital, testified that she assisted in the treatment of the victim when he was brought into the hospital by the Emergency Medical Service. After the victim's condition was stabilized preparatory to surgery, Newsome told Henegan that "his woman Wealthy...shot him, took his money and took his car and was going up to Detroit." Tr. 38.

Officer David Sabo of the Cleveland Police Department testified that when he arrived at the home of the victim on February 17, 1980, the wounded victim advised him that appellant Wealthy Mae Johnson shot him three times. The victim also said that the appellant had taken $235.00 out of his pocket and had then left. At the hospital, the victim essentially repeated these comments.

We need not determine whether the above statements by the victim were properly admissible as dying declarations insofar as they purported to establish that the appellant shot the victim. Appellant fully admitted, in her own testimony, that she shot Newsome. By going forward with the presentation of this evidence, appellant must be deemed to have waived the validity of the admission of these statements to the extent that they implicated her in the shooting of Newsome.

The other assertions attributed to the victim (i.e., that the appellant had taken his money and his car and had fled to Detroit)

(u)

probably were not admissible as dying declarations.[2/] Appellant, however, was not charged with any type of theft offense. These extraneous allegations by the victim were irrelevant to proof of voluntary manslaughter, the only offense with which appellant was charged and the focus of the trial. Given that appellant admitted shooting Newsome, these other comments constituted a mere harmless distraction for the jury. The admission of these other comments did not prejudice appellant. We conclude that the admission of the assertions by the victim regarding appellant's alleged theft of the victim's car and money and the appellant's flight to Detroit constituted harmless error beyond a reasonable doubt.

The first assignment of error is not well taken.

II. THE PROSECUTOR'S COMMENT, TO THE EFFECT THAT THE ACCUSED HAD CONTACTED AN ATTORNEY IN PREFERENCE TO CONTACTING THE POLICE AND TELLING THEM SHE HAD SHOT

2/ Evidence Rule 804 requires that the validly admitted dying declaration concern the cause or circumstances of the individual's impending death. Testimony that the appellant had taken the victim's money and car and had fled to Detroit did not concern the cause of the victim's death. Evidence Rule 804 provides, in relevant part, as follows:

"RULE 804

"HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

* * *

"(B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

"(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." (Emphasis added.)

Moreover, these statements were not admissible under any other exception to the hearsay rule. Contrary to the state's argument, these statements did not qualify as "Excited Utterances" under Evidence Rule 803(2) such that they could be admitted under that hearsay exception. That rule requires that the statement relating to a startling event or condition must have been "made while the declarant was under the stress of excitement caused by the event or condition." Evidence Rule 803(2). In the instant case, the victim made his statements after the shooting had occurred and the appellant had fled. There is no indication in the record that the victim was excited at the time he made the statements.

THE DECEDENT IN SLEF-DEFENSE [SIC], CONSTITUTED PREJUDICIAL ERROR AND A VIOLATION OF DUE PROCESS BECAUSE SUCH COMMENT AND THE RESULTING INFERENCE EQUATED THE DEFENDANT'S EXERCISE OF HER RIGHT TO COUNSEL WITH AN ADMISSION OF GUILT; THEREBY PENALIZING THE DEFENDANT FOR EXERCISING HER CONSTITUTIONAL RIGHT TO COUNSEL.

In her second assignment of error, appellant asserts that the prosecutor impermissibly commented, in final argument, upon the appellant's decision to contact an attorney, rather than the police, following the shooting. Appellant asserts that these comments violated her constitutional rights to counsel and to a fair trial.

In support of her arguments, appellant points to a number of portions of the transcript in which the prosecutor ridiculed appellant's assertion that she acted in self-defense and that the victim had a knife. In substance, the prosecutor argued that if appellant had truly acted in self-defense, she would not have fled. Instead, she would have contacted the police, rather than an attorney, and told them that she had acted in self-defense. See Tr. 167-168, 175-176.

Given that appellant had admitted that she fled after shooting Newsome, it was entirely permissible for the prosecutor to comment upon this evidence as part of his final argument. This commentary aided the jury in drawing reasonable inferences from the evidence.

Further, the prosecutor's comments as to appellant's failure to advise the police of her story and her decision to contact an attorney were not inappropriate in this case.

The prosecutor's comments constituted mere commentary upon the evidence presented. The appellant testified on direct examination that she had contacted an attorney after fleeing:

"Q [by Mr. Willis]: Then what did you do?

"A [by appellant]: When I started firing I just closed my eyes and went crazy. After that I ran out the house and went out the side door and went. And I contacted you." (Emphasis added.) Tr. 133.

Thus, appellant "opened the door" to inquiry and comment about her actions immediately subsequent to the shooting, including her decision to contact an attorney. This testimony of the appellant was properly admitted into evidence. The prosecutor was permitted, therefore, to comment on the evidence presented of appellant's behavior and the inferences which could be drawn therefrom in light of appellant's assertion that she had acted in self-defense.

Moreover, the prosecutor's comments did not constitute an attempt to penalize the appellant for exercising her right to counsel. The prosecutor's comments focused upon the appellant's flight from the scene of the shooting and her delay in coming forward to the authorities after the shooting.[3] Also, the prosecutor's comments did not constitute an impermissible commentary upon appellant's exercise of her right to silence.[4]

3/ The prosecutor stated, in relevant part, as follows:

"***But what do you have in front of you as far as evidence of a struggle? You have got a person who leaves the scene immediately after shooting and critically wounding someone, who has testified to you point-blank that she got rid of the gun, the first thing she did, threw it as far away as she could. And then proceeds to go to a friend's house.

* * *

"But let me ask you this: Wouldn't you have, if someone had attacked you with a knife and you had shot them, wouldn't you, after you calmed down after the incident, have called the police and tell them there was an accident, this is what happened, this is where I am?

* * *

"Or would the first thing you would do be to contact an attorney and then wait a few days before you go make your appearance at the police station?" (Emphasis added.) Tr. 174-175.

4/ This was not a situation where the defendant was in custody of the police and refused to make a statement after being advised of her rights. Inquiry into and comment upon such silence by the prosecutor would violate a defendant's consti-

(Footnote 4, continued following page)

Given the totality of the circumstances, we conclude that the prosecutor's comments did not constitute prejudicial error. Appellant's due process rights were not effected. The second assignment of error is without merit.

III. THERE IS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT THE CONVICTION IN THIS CASE.

In her third assignment of error, appellant argues, in substance, that the state had the burden of proving that she did not act in self-defense when she shot and killed John Newsome. The state failed to carry this burden, appellant argues, and therefore, the evidence was insufficient to support her conviction of voluntary manslaughter.

R.C. 2901.05 provides, in pertinent part, as follows:

"§2901.05 Burden and degree of proof.

"(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

* * *

"(C) As used in this section, an 'affirmative defense' is either of the following:

"(1) A defense expressly designated as affirmative;

"(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.***" (Emphasis added.)

4/ Continued:

tutional right to silence upon arrest. See State v. Eiding (1978), 57 Ohio App. 2d 111. In the instant case, the appellant's pre-arrest behavior was the basis of comment, given that appellant had testified on direct examination that she contacted her attorney after fleeing the scene of the shooting.

We decline to adopt as an absolute rule that whenever a prosecutor comments that a defendant contacted an attorney, this deprives a defendant of his right to a fair trial and that this constitutes prejudicial error. Appellant has cited no case to us from this jurisdiction in support of her position on this issue.

(8)

This court has stated emphatically that R.C. 2901.05(A) which requires a defendant to prove an affirmative defense by a preponderance of the evidence is constitutional. In the case of State v. Newell (December 28, 1979), ____ Ohio App. 2d ____, Eighth Appellate District, No. 40470, a defendant claimed the affirmative defense of duress when charged with escape from jail and the possession of criminal tools. This court stated as follows:

> "1. The requirement imposed upon the defense by Revised Code 2901.05(A), as amended, to prove any affirmative defense it may claim by a preponderance of the evidence, does not deprive a defendant of his or her right to due process and is not unconstitutional.
>
> "2. The state has the burden of proving beyond a reasonable doubt each and every element of the offense charged. When the accused raises an affirmative defense, which does not serve to negate any element of the crime charged, but instead raises a separate issue or defense, the burden is upon the accused to prove the defense by a preponderance of the evidence." (Syllabi 1 and 2.)

In the case of State v. Callahan (December 11, 1980), Eighth Appellate District, No. 41737, this court applied the Newell rationale to the affirmative defense of insanity. We concluded that the defendant had the burden of proof on the issue of insanity by a preponderance of the evidence.

In the case of State v. Britten (March 27, 1980), ____ Ohio App. 2d ____, Eighth Appellate District, No. 40644, this court applied the Newell rationale to hold that it was appropriate to place the burden of proving the affirmative defense of self-defense by a preponderance of the evidence upon a defendant.

Further, in an appeal of a denial of a petition for habeas corpus, the U.S. Sixth Circuit Court of Appeals stated as follows in the case of Krzeminski v. Perini (1980), 614 F 2d 121, 123-124:

(9)

"***The judge instructed the jury that the petitioner had the burden of proving by a preponderance of the evidence that he was not guilty by reason of insanity. Similarly, the judge instructed the jury that anger negating intent or premeditation was an affirmative defense which the defendant also had to show by a preponderance of the evidence.

"The petitioner claims that the imposition of these burdens of proof on him violated due process.

* * *

"Petitioner's claim is foreclosed by Patterson v. New York, 432 U.S. 197; 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Patterson makes it clear that so long as a jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant. Patterson, supra; Hankerson v. North Caroline, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977); Rivera v. Delaware, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976), dismissing for want of a substantial federal question 351 A.2d 561 (Del. 1976); Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952). What the state may not do is presume that an element of a crime exists as a result of given conduct and then place the burden of showing otherwise on the defendant.***" (Emphasis added.)

Pursuant to the Britten case supra, we conclude that the appellant had the burden of proving, by a preponderance of the evidence, the affirmative defense of self-defense. The state had no burden on this issue. 5/

5/ In the case of State v. Tuncle (March 8, 1979), Eighth Appellate District, No. 38424, this court affirmed a defendant's conviction of voluntary manslaughter. The text of the opinion in Tuncle contained language to the effect that the state had the burden of disproving the affirmative defense of self-defense beyond a reasonable doubt.

The Tuncle case was decided prior to this court's landmark decision in State v. Newell, supra, which placed the burden of proof of an affirmative defense upon a defendant. Tuncle was decided without the benefit of the Newell reasoning.

Moreover, the language of the Tuncle opinion which places the burden of disproving beyond a reasonable doubt the affirmative defense of self-defense upon the state was only the opinion of one member of the court which decided Tuncle. Of the two remaining members of the panel, one member concurred in judgment only. The other judge wrote a separate concurrence which stated, in relevant part, as follows:

Footnote 5 continued on following page.

In the instant case, appellant was charged with the offense of voluntary manslaughter. 6/ The state had the burden of proving, beyond a reasonable doubt, that appellant knowingly caused the death of John Newsome. 7/ At trial, there was ample evidence to justify the conclusion that appellant knowingly caused the death of John Newsome. She admitted that she went upstairs to the bedroom of their home, took Newsome's gun, and fired at him three times. Dr. Elizabeth Balraj of the Coroner's Office testified that John Newsome died as a result of the gunshot wounds.

As we have noted, appellant had the burden of proving, by a preponderance of the evidence, the affirmative defense of self-defense.

5/ Continued

"I concur in the judgment of affirmance because the state met its burden of proving each and every element of the offense of voluntary manslaughter beyond a reasonable doubt.***It is not necessary to discuss or consider any burden of proof by the state in regard to self-defense***." (Krenzler, J., concurring.)

In contrast to this, the opinion of State v. Britten, supra, which placed the burden of proving self-defense upon the defendant, had the concurrence of all three members of the panel deciding that case. Thus, State v. Britten, rather than Tuncle, is binding authority upon this court.

6/ R.C. 2903.03 defines voluntary manslaughter as follows:

"§2903.03 Voluntary manslaughter.

"(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.
"(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree."

R.C. 2901.22, Culpable Mental States, defines "knowingly" as follows:

"(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

7/ Proof of extreme emotional stress is not an element of voluntary manslaughter. It is "a circumstance the establishment of which mitigates a defendant's criminal culpability" when a defendant is charged with murder or aggravated murder. State v. Muscatello (1978), 55 Ohio St. 2d 201, 203.

Thus she asserted that she had been beaten by Newsome many times throughout the course of their relationship; that she shot Newsome as he pursued her with a knife; and that Newsome was beating her "like he was crazy." The jury simply chose not to believe that appellant acted in self-defense.

It was the jury's province to determine the credibility of the witnesses. The jury had the option of believing all or part of any witness' testimony. The weight to be given evidence and the credibility of the witnesses are primarily matters for the trier of fact. State v. DeHass (1967), 10 Ohio St. 2d 230. On the record before us, there was sufficient evidence to support the judgment of conviction.

The third assignment of error is without merit.

For the above reasons, the judgment is affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

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PRYATEL, J., CONCURS.

JACKSON, C.J., DISSENTS (See Dissenting Opinion, Jackson, C.J., attached)

JUDGE
ALVIN I. KRENZLER

APPEARANCES:

For plaintiff-appellee: John T. Corrigan

For defendant-appellant: James R. Willis

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO 42846

State of Ohio

APPELLEE

-vs-

Wealthy Johnson

APPELLANT

APPEAL FROM

COMMON PLEAS COURT

No. Cr. 53713

DISSENTING
JOURNAL ENTRY
AND
OPINION

DATE JUL 16 1981

JACKSON, C.J., DISSENTS:

I respectfully dissent from the decision of the majority which affirms the judgment of the trial court. The issue upon which I disagree with the majority decision is whether the State may require the accused in a criminal case to assume the burden of establishing her innocence by proving that she acted in self-defense in taking the life of another individual.

In deciding whether the State could constitutionally require the accused to prove that she acted in self-defense, consideration must be given to the decisions of the United States Supreme Court in In re Winship (1969), 397 U.S. 358; Mullaney v. Wilbur (1975), 421 U.S. 684; Patterson v. New York (1977), 432 U.S. 197; and Hankerson v. North Carolina (1977), 432 U.S. 233. As I indicated in the majority opinion in State v. Tuncle (March 8, 1979) No. 38424, pp. 4-6, an analysis of those cases can only lead to the conclusion that:

> "Where the affirmative defense does not negate an element of the offense charged, the burden may properly be placed on the accused. However, it is a violation of due process to require the accused to prove an affirmative defense which negates an element of the crime charged." Tuncle, supra at 6. (citation omitted).

This view has been adopted not only by the Federal Circuit Courts,[1] but also by the Ohio Supreme Court. E.g., State v. Frost (1979), 57 Ohio St. 2d 126, 127.[2]

The majority did not choose to make an independent examination of the requirements of Winship, Mullaney, Patterson or Hankerson. Nor did the majority attempt to reply to the analysis of those decisions set forth in State v. Tuncle, supra. Rather, the majority seeks to avoid the force of those decisions by reference to a passage in Krzeminski v. Pereni (6th Cir. 1980), 614 F.2d 121, 123-124, which states that there is no due process violation if the State places upon the accused the burden of proving "affirmative defenses such as self defense. . . ." (Majority Opinion at 9). Such reliance upon Krzeminski is misplaced for several significant reasons.

1/ E.g., Farrell v. Czarnetzky (2d Cir. 1977), 566 F.2d 381, cert. denied (1978), 434 U.S. 1077; Holloway v. McElroy, (1980), 632 F.2d 605, 625, cert. denied (1981), ___U.S.___, 49 L.W. 3881 (Rehnquist, J., & Berger, J.C., dissenting).
> "...despite a State's characterization of an issue as being an 'affirmative defense,' the State may not place the burden of persuasion on that issue upon the defendant if the truth of the 'defense' would necessarily negate an essential element of the crime charged." Holloway v. McElroy, supra at 625.

2/ In Frost the Supreme Court sustained the placing of the burden of proof upon an accused as to a mitigating factor:
> "It is not unconstitutional to require a defendant to carry the burden of proof in such a case, because it does not require the defendant to negate any facts of the crime which the state must prove in order to convict." Frost, supra at 127. (Emphasis added) (Footnote omitted).

Initially, it must be emphasized that while this court may give respectful consideration to the decisions of the Sixth Circuit Court of Appeals, those decisions are not binding upon us. We are, however, bound by decisions of both the Ohio Supreme Court and the United States Supreme Court. Consequently, given a choice between following State v. Frost, supra, and Winship and its progeny, on the one hand, and Krzeminski, on the other, this court has no choice but to follow the former.

Equally as serious is the fact that the language relied upon in Krzeminski was obiter dictum. The very language quoted by the majority at page 9 of its opinion indicates that Krzeminski involved the issue of insanity and was not a case of self-defense. This is more than a mere technicality. The affirmative defenses of self-defense and insanity have different origins and different functions in the theory of criminal law. At common law self-defense was, as it is in Ohio, justified; if an individual acted in self-defense, he acted lawfully and committed no crime. This was not true of insanity. Rather than a justification, insanity was considered an excuse: society did not punish the insane person because it seemed unfair and uncivilized to punish one whose mental state made it impossible for him to understand the wrongfulness of his actions, or made it impossible for him to refrain from committing the criminal act for which he is charged.

That this is not an idle distinction can be demonstrated by reference to the decisions of the United States Supreme Court itself. That court has indicated that an accused can be required to bear the burden of proof in cases involving the defense of insanity. Leland v. Oregon (1952), 343 U.S. 790; Rivera v. Delaware (1976),

429 U.S. 877 (summary dismissal).

If the principles which apply to insanity automatically applied to self-defense as well then the Supreme Court should have affirmed the decision of the state court in Hankerson. The fact that it did not do so, but instead specifically reserved decision upon the applicability of Mullaney to claims of self-defense indicates that, as far as the Supreme Court is concerned, the distinction between insanity and self-defense is one that makes a "difference."[3/] Consequently, it is significant that the expressions of the Sixth Circuit Federal Court concerning self-defense are dicta.[4/]

Third, the fact that the portion of Krzeminski relied upon by the majority is dicta which is not intended to be applied to self-defense is forcefully demonstrated by the subsequent treatment of that case by the very same judges who decided it. The panel in that case consisted of Chief Judge Edwards, Senior Judge Phillips and Judge Keith. In spite of the Krzeminski dicta, Judge Edwards indicated in Isaac v. Engle (6th Cir. 1980), (en banc), 646 F.2d 1129, cert. granted, ____U.S.____, 49 L.W. 3778, that the burden of proof could not be placed upon the accused to prove self-defense if it negated criminal intent.[5/] Similarly, Judge Phillips, in the original panel

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3/ One other possible interpretation would be that Hankerson and Patterson presage the demise of Leland and Rivera. It is not important to consider such an argument here, since it would hardly support the position of the majority.

4/ Of course, if dicta is to be our guide, we might also consider another Sixth Circuit decision, also concerning insanity:
"Because the defense of temporary insanity negates criminal intent, which is an essential element of the crime, the burden of proof is necessarily on the prosecution." (citing Patterson & Mullaney.) United States v. Jackson (6th Cir. 1978), 587 F.2d 852.

5/ "Here the burden of proof of self-defense was definitely placed on the defendant. Criminal intent of aggravated assault and self-defense are, in my view, completely irreconciable. To require a defendant to carry the burden of proof on self-defense is to require him to disprove criminal intent." (footnote omitted.) 646 F.2d at 1136.

decision, joined the opinion of Judge Peck in specifically reserving the issue of whether the state violated due process by making the accused prove that he acted in self-defense.[6/] Obviously, if Krzeminski stood for the proposition for which it is cited by the majority, Judge Edwards would have taken a contrary position in Isaac and Judge Phillips would not have reserved the issue in the panel decision in the same case.

I am persuaded by all of these reasons that Krzeminski cannot support the position taken by the majority with respect to the burden of proof upon the issue of self-defense. Nor is their position bolstered by the three unreported decisions cited from this court.

The first of these decisions, State v. Newell (Dec. 28, 1979), No. 40470, involved the defense of duress rather than self-defense. Like insanity, duress has both a different history and a different theory than self-defense. Further, though the availability of self-defense is guaranteed by both the State[7/] and Federal constitutions[8/] as a right of all persons, the defense of duress has no such pedigree. Consequently, Newell, even if correctly decided as to duress, has no application to self-defense.

Of greater importance is the fact that Newell, though citing Patterson, failed to analyze or otherwise acknowledge the explicit

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6/ "Since we find petitioner's selective retroactivity claim to be meritorious, we do not deem it necessary to address appellant's further assertion that the jury instructions at his trial were unconstitutional." 646 F. 2d at 1127.

7/ Art. I, Sec. 1 lists as one of the "inalienable rights" that of "defending life. . . ."
Art. I, Sec. 4 provides that the people "have the right to bear arms for their defence."

8/ See Fourth, Fifth, Sixth, Eighth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution. Cf. Second Amendment.

holding of that case with respect to the prohibition against placing the burden of proof upon the accused on a matter which negates an element of the offense. Rather, in ipse dixit fashion the Newell decision simply asserts that Patterson allows the burden of proof to be placed upon the accused on mitigating factors; that affirmative defenses are analogous to mitigating circumstances; and that consequently there is no constitutional infirmity in placing the burden of proof upon the accused. As I have indicated elsewhere, "To make this statement does not make it so."[9/] In this case, the analysis set forth in Tuncle indicates, at least with respect to self-defense, that "it is not so." As the majority here notes, Tuncle was decided prior to Newell. Thus, if, as posited by the majority, the principles that apply to duress are equally applicable to self-defense, then the Newell decision could be expected to have treated the analysis of the Supreme Court decisions set forth in Tuncle. However, an examination of Newell will reveal that that case neither cites Tuncle nor considers any analysis set forth in that opinion. Whether this was the result of the feeling of the Newell panel that the principles of self-defense were not applicable to duress, or other reasons, it should be reasonably apparent that that decision cannot be said to have rejected arguments or analysis which it never purported to consider.

State v. Callahan (Dec. 11, 1980), No. 41737 also gives no support for the majority position, since it, like Krzeminski, was a case involving the issue of insanity which has no application to a

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9/ State v. Martin Kilbane, et al. (July 3, 1979), Nos. 38428, 38383 & 38433, dissenting opinion at 32, fn. 21*. But see Steele et al. v. Taylor et al. (Feb. 20, 1981), No. C80-349, United States District Court, N.D. Ohio, Magistrate's Recommendation and Judge White's decision in the same case. (Apr. 2 , 1981).

self-defense case such as Tuncle or the case at bar. Like Newell, on which it relied, Callahan did not acknowledge the holding of Patterson nor address any of the analysis set forth in Tuncle.

It was only in State v. Britten (March 27, 1980), No. 40644, that application of the holding in Patterson was raised with respect to the issue of self-defense. Unfortunately, Britten simply quoted from Newell and uncritically adopted its holding concerning duress to the affirmative defense of self-defense. Again there was no independent analysis of the holding of the United States Supreme Court in the Winship line of cases; there was no consideration of Tuncle; and there was no consideration of the analysis set forth in Tuncle. Like Callahan, Britten cannot be said to have rejected a position it obviously did not consider.

After reading the majority opinion, I arrive at the same conclusion with which I began: the State cannot place the burden of proof upon an accused on a matter - even if called an "affirmative defense" - if proof of that matter would necessarily negate an element of the crime charged.

In State v. Tuncle, supra, it was held that self-defense negated the unlawfulness of the crime in a voluntary manslaughter case.[10/] The

10/ The colleague who concurred in my opinion in Tuncle now indicates that he was only concurring in judgment. The practice of this court has been that any judge on a panel may concur, concur in judgment only, or dissent in response to a proposed majority opinion. In all three instances a member of the panel may elect to write or not writ a separate opinion. In Tuncle, the author of the majority opinion in the case at bar elected to concur and to write a separate opinion. However, in marked distinction to the third member of the Tuncle panel, there was no indication that the author of the present majority opinion was concurring in judgment only.

In deference to the author of the majority opinion in the case at bar, at least an attempt was made to distinguish Tuncle, apparently the first decision on the issue in controversy. However, other than Newell, Britten, and Callahan, I have found two other decisions released by panels of this court, on which I did not participate, which purported to consider the issue. These cases also did not mention Tuncle, attempt to distinguish it, or consider the analysis set forth therein. These cases are: State v. Thomas Francis and John Francis (Oct. 23, 1980), Nos. 41972 and 41973; and State v. Gober (May 7, 1981), No. 42974.

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logic of this result is not difficult. The right to act in self-defense, as guaranteed in the Ohio and United States Constitutions, is a lawful act. By definition, a crime is not a lawful act.

> "It should be conceded, as an axiomatic proposition, that an indictment or information must in some manner charge the unlawfulness of the defendant's conduct." Annot., 169 A.L.R. 166 (1947).

In Ohio this result is required by Art. IV, Sec. 20 of the State Constitution which mandates that every indictment shall contain an allegation that the act in question was "against the peace and dignity of the State of Ohio." These words constitute an allegation of unlawfulness. Hamilton v. Alvis (1959), 109 Ohio App. 298,301. Hence, proof of self-defense necessarily negates the unlawfulness of the act and, consequently, the burden of proof on that issue cannot be placed upon the accused. This is not merely my conclusion, but that of almost every court which has considered the issue. See cases collected in Tuncle, supra, at 7-8 and State v. Kirtley (W. Va. 1979), 252 S.E. 2d 374, 380.

But even if there were no specific element which self-defense could be said to negate, the results would be the same. Because the act of self-defense is constitutionally guaranteed, see authorities collected in State v. Hardy (1978), 60 Ohio App. 2d 325, it is lawful and not criminal conduct. E.g., State v. Clifton (1972), 32 Ohio App. 2d 284; State v. Jones (1975), 47 Ohio App. 2d 8. Thus, proof of self-defense necessarily negates the whole crime. This is the reason self-defense is referred to as a "complete" defense, e.g., State v. Solomon (1981), 66 Ohio St. 2d 214 (Syl. 2), State v. Nolton (1969), 19 Ohio St. 2d 133. This is also the reason juries are instructed to return not guilty verdicts, if it is found that the accused

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acted in self-defense. Indeed, in the case at bar the jury was instructed that the defendant was "justified" (Tr. 195, 196), if she acted in self-defense.[11/] If there is a constitutional violation when the burden of proof is placed upon the accused to prove a matter which negates only one single element of a crime, it follows, a fortiori that there is an even more grievious violation when proof of that matter necessarily negates all of the elements proving that a crime was committed.

When considered from this perspective, the only justification for the majority's position apparently would be to declare self-defense to be a "mitigating factor" under Patterson, meaning that it bore no relation to guilt or innocence, but rather was a matter of legislative grace by which a criminal and wrongdoer could escape punishment. This would, of course, necessarily imply that the legislature could abolish self-defense (and the right to mitigation) at will. But to attempt to criminalize actions taken in self-defense would not only be a futile way to attempt to govern conduct[12/] but it would be contrary to the -

> ". . .universal judgment that there is no social interest in preserving the lives of aggressors at the costs of those of their victims. Given the choice that must be made, the only defensible policy is one that will operate as a sanction against unlawful aggression." Weschler and Michael, "A Rationale of the Law of Homocide I," 37 Columbia Law Review, 701, 736 (1937).

11/ The plain ordinary definition of "justified" is free from blame or guilt or morally or legally right. See The Random House Dictionary, 1978.

12/ On the unenforceability of such a statute see O.W. Holmes, Jr., The Common Law 47 (1881):

> "...the law cannot prevent [self defense] by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat."

The constitutional infirmities that would occur by any attempt to transform lawful action taken in self-defense into criminal acts are set forth in State v. Hardy, supra. Therefore, this avenue is also closed to the majority.

In spite of the majority's reliance upon the three unreported decisions from this court, it is important to remember that a judicial decision is not an election: it depends upon the mandate of the law and not the counting of judicial noses.

> ". . .however venerable the error may be, and however often it may have been repeated, it must fall before the Constitution. . . ." State v. M'Cready v. Hunt 15 S.C. 291, 501 (1834).[13/]

In this case, the error is hardly a "venerable" one and, if we accept the view that self-defense is unique unto itself, then it has not been "repeated," but only promulgated in Britten, and then without a fair consideration of the issues presented above.

We live in a time of increasing violence and crime. Justice Rehnquist recently observed that the law enforcement authorities "cannot protect the lives of employees of this very court [the United States Supreme Court] who live four blocks from the building in which we sit. . . ." Coleman v. Balkcom, ___U.S.___, 49 L.W. 3804, 3805 (dissent from denial of certiorari). Yet under the position taken by the majority any of these employees, even the Justices themselves, if attacked by a criminal who they killed in self-defense, would be required to prove their innocence. We are also informed that the police of this country are themselves endangered and forced to kill hundreds of individuals a year in self-defense. See Sherman, "Execution Without Trial: Police Homocide and the Constitution,"

13/ In M'Cready the court indicated that the error must "fall" because it was in conflict with the State Constitution. In the case at bar it must fall because it conflicts with both the State and the Federal constitutions.

33 Vanderbilt Law Rev. 71 (1980). Under the majority's concept of the issue each of the police are subject to indictment for murder and released only if they can prove their innocence. We know that individuals are assaulted daily in our city and that the use of self-defense may in many instances be the only way to preserve the life of the law abiding citizen. Yet, the clear import of the majority decision as I read it, holds that such a citizen, acting in self-defense, must carry the burden of proving that he acted in self-d or be found guilty. In my humble opinion, this is contrary not only to the Ohio and United States Constitutions, but also to logic and common sense,

I am reconciled to the possibility in the present judicial climate that the position of the majority in the case at bar may prevail: that citizens will lose their inalienable right of self-defense, or that, when acting upon the lawful exercise of that right, they will be required to prove their innocence. Nevertheless, if that position does prevail, it will do so without my support and over my most vigorous dissent.

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(24)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO 43219

STATE OF OHIO APPEAL FROM

APPELLEE COMMON PLEAS COURT

-vs- No. CR 56417

JOURNAL ENTRY
AND
OPINION

APPELLANT

DATE OCT 15 1981

STILLMAN, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and as argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Deborah Washington, defendant-appellant (appellant) was indicted on one count of murder on July 17, 1980. The indictment arose out of the shooting death of appellant's husband, Herman Washington, at the couple's home on June 13, 1980. On November 19, 1980, subsequent to the commencement of trial, the indictment was amended to one count of voluntary manslaughter. Appellant plead not guilty and trial commenced to a jury on November 17, 1980.

I.

At trial, appellant admitted shooting her husband during an altercation but raised the affirmative defense of self-defense. The following evidence was adduced at trial:

Appellant and Herman Washington began dating in 1975, and began living together when appellant was 19 years of age, in 1976. A year later they were married, and by June, 1980, divorce proceedings had been initiated by appellant.

Appellant testified at length to a relationship involving a series of beatings and physical abuse suffered by her at the hands of her husband. (Tr. 237-298, 330-337) Appellant testified to fourteen separate incidents of beatings, five of which required hospital treatment. (Tr. 297-298, 381) Defense witness Kim Marcano testified she observed a fight between decedent and appellant which occurred in November, 1977 (Tr. 163) Other defense witnesses testified to arguments observed, but none actually witnessed any physical contact between appellant and her husband. Appellant's sister, Linda buford from Xenia, Ohio, testified to seeing the "after effects" of Herman Washington's physical abuse of appellant in the form of facial bruises on several occassions. (Tr. 190, 194-195)

State's witnesses Robert and Nettie Harden, Herman Washington's nephew and niece, respectively, both testified they were close to appellant and her husband, but had never observed any physical contact between them. Further, both witnesses contradicted testimony of appellant relating to specific instances of alleged beatings. (Tr. 85-86, 410-412)

Appellant sought to introduce testimony by the decedent's former wife, Christine Goldsbey, relative to beatings allegedly received from decedent. Appellant also sought to testify Christine Goldsbey had informed the appellant of these incidents prior to the shooting death of her husband. The court refused to admit this testimony although appellant was permitted to testify she was aware of certain "episodes" involving Goldsbey and the decedent without being permitted to describe the episodes in any manner. (Tr. 226-229, 335-3357, 398)

Appellant further sought to introduce evidence, in the form of a document filed in a prior prosecution of Herman Washington, establishing certain acts of violence by Herman Washington against the property of his former girlfriend, Lorice Price. The court refused to allow such evidence and refused to allow appellant to testify she was informed by Ms. Price of such incidents, although she was permitted to testify she was aware of certain episodes involving Lorice Price and Herman Washington. (Tr 253-262)

Appellant sought spiritual as well as legal counsel concerning her marriage, and in early June, 1980, she initiated divorce proceedings. The week before the shooting, appellant had shown decedent the divorce papers she had filed, including a motion for a restraining order and a motion to vacate the premises. (Tr. 299-303)

On the night before the shooting, appellant and the decedent argued and the decedent demanded she withdraw money from a savings account and give it to him. Apparently, the decedent was apprehensive he would be denied access to the funds during the divorce proceedings.

Following the argument, appellant drove Robert Harden, Nettie Harden and a cousin to Robert's high school graduation exercise. According to Nettie Harden, appellant was angry upon leaving the house, and said to her [Harden]: "One day you are going to wake up and your uncle is going to be dead." (Tr. 409) After the exercise, appellant returned home and gave Robert Harden use of her car for the night. (Tr. 302-304)

The following morning, Robert Harden returned appellant's car. At appellant's request, Harden placed some of appellant's baby's things in the car, while appellant got ready for work. Harden went back inside the house and appellant asked him to come upstairs and get the baby. Harden testified he heard appellant and the decedent arguing over money. According to appellant, she and her husband were having the same argument they had the night before. (Tr. 59-62, 337-339)

Appellant testified her husband then grabbed her purse, hit her with it and slapped her, knocking her to the bed. He slapped her again. She kicked him away, and reached under the bed for the .22 caliber handgun she had purchased approximately two weeks prior. She grabbed the gun and fired two shots at her husband. (Tr. 339, 354-361, 373)

Robert Harden testified he had reached the top of the stairs when he heard two gunshots. He cautiously peered into the bedroom from where the shots had come and saw his uncle stagger toward him, clutching the door. It was then Harden saw the gun in appellant's hand. Harden turned and ran down the stairs with his uncle following. Appellant stood at the top of the stairs and fired two to three more shots. (Tr. 307-310, 338-340)

Appellant testified she fired the original shots because she feared for her life, and that she continued firing at her husband because she feared he was going to get his shotgun and kill her. (Tr. 340-343, 376-380) Appellant further testified that at the time of the shooting she was under extreme emotional stress brought on by adequate provocation to incite her to use deadly force. (Tr. 385-386, 396-397)

Following the shooting, appellant ran from the house and flagged down a passing car which took her to a telephone booth where she called the police.

The assistant county coroner testified the gunshot wound inflicted by appellant caused the death of Herman Washington. (Tr. 31-32)

The trial court charged the jury on the defense of self-defense and specifically charged, in accordance with R.C. 2901.05(A), that appellant had the burden of proving said defense by a preponderance of the evidence. (Tr. 523-525). During their deliberations, the jury requested the court to repeat its charge on self-defense three times. (Tr. 539-550, 552-557)

Upon the evidence as presented, the jury found appellant guilty of voluntary manslaughter, and the court sentenced appellant to a term of imprisonment of four to twenty-five years. Appellant has brought this timely appeal from the verdict and judgment, presenting the following as error for review:

ASSIGNMENTS OF ERRORS

I. THE COURT ERRED OR ABUSED ITS DISCRETION IN EXCLUDING CERTAIN RELEVANT EVIDENCE, WHICH EVIDENCE BORE DIRECTLY ON THE DEFENSE OF SELF-DEFENSE.

II. THE COURT ERRED BY INSTRUCTING THE JURY, DESPITE THE LACK OF ANY FACTUAL SUPPORT IN THE EVIDENCE, THAT IF THE DEFENDANT BECAME THE AGGRESSOR, HER RIGHT OF SELF-DEFENSE WAS LOST.

III. DUE PROCESS IS VIOLATED WHEN THE COURT CHARGES THAT THE ACCUSED HAS TO ESTABLISH THAT SHE WAS NOT THE AGGRESSOR AND THAT THE DECEDENT WAS, AS A PREREQUISITE TO RAISING THE DEFENSE OF SELF-DEFENSE, VIOLATED DUE PROCESS. [SIC].

IV. THERE IS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT THIS CONVICTION.

V. THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS CONTRARY TO LAW.

VI. THE COURT ERRED IN DENYING APPELLANT'S RULE 29, OHIO RULES OF CRIMINAL PROCEDURE, MOTION FOR JUDGMENT OF ACQUITTAL OR FOR A NEW TRIAL.

VII. THE PROVISIONS OF R.C. OF OHIO, §2901.05(A) TO THE CONTRARY NOTWITHSTANDING, DUE PROCESS IS VIOLATED WHEN THE COURT INSTRUCTS THE JURY THAT THE DEFENDANT MUST PROVE SHE ACTED IN SELF-DEFENSE.

II.

In her first assignment of error, appellant alleges certain relevant evidence was improperly excluded at trial.

Appellant first alleges a document filed on behalf of the decedent in a prior prosecution in which decedent was the [illegible] should have been admitted. Appellant asserts the document, a reply by decedent's attorney to a request for discovery by the state in the prior prosecution, constitutes a statement by the decedent which was contrary to his penal interest. Accordingly, appellant argues said statement is admissible as an exception to the hearsay rule, under Rule 803(B)(3) of the Ohio Rules of Evidence.[1/] The document contains the decedent's version of an incident during which he entered the apartment of Lorice Price, his girlfriend, and destroyed certain items of furniture and personal property.

1/ Evid. R. 803(B)(3) provides as follows:
"(B) Hearsay exceptions.
The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
* * *
"(3) Statement against interest.
A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Whether or not the statement constitutes an exception to the hearsay rule, the statement is inadmissible unless relevant. Appellant contends the statement is relevant in establishing the violent character of the decedent. Such evidence of the decedent's character is relevant to establish, as between the decedent and appellant, who was the first aggressor in the affray which resulted in the death of the decedent. However, evidence of the decedent's character, offered to prove he acted in conformity therewith at the time of his death, may be in the form of reputation or opinion evidence only, and not in the form of evidence of specific instances of conduct. Evidence Rule 404.[2/] Thus, the document offered into evidence relating to the specific incident of conduct by decedent tending to establish his violent character is inadmissible.

Appellant further sought to testify to her knowledge of the incident involving the destruction of Lorice Price's property by the decedent, as related to her by Lorice Price prior to the

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2/ Evid. Rule 404 generally prohibits the admission of evidence of a person's character to establish he acted in conformity therewith on a particular occasion, but permits a defendant claiming self-defense to introduce evidence of the victim's character. Evid.R. 404(A)(2). Evid.R. 405 then controls the method by which proof of the victim's character may be proven, limiting such proof to reputation or opinion evidence. Rule 405 provides as follows:

"(A) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

"(B) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

death of the decedent. In addition, appellant sought to introduce the testimony of decedent's probation officer relative to his knowledge of the incident.

The testimony of the probation officer in this regard is again relevant only to prove decedent acted in conformity with a character trait, and is therefore inadmissible under Evid. R. 405 as a specific instance of conduct.

The testimony of appellant, however, would have established her knowledge of the incident and would have therefore been relevant to establish her state of mind at the time of the shooting. Appellant's proffered testimony was not offered to prove the decedent was in conformity with his violent character; rather the testimony was proffered to show appellant knew of a particular incident of the decedent's violent behavior and therefore had reason to fear for her life.

Appellant, claiming the killing was in self-defense, had the right to prove she possessed a reasonable fear of great bodily injury or death at the hands of the decedent. Marts v. State (1875), 26 Ohio St. 162; State v. McGue (1931), 123 Ohio St. 195. She therefore had the right to establish her grounds for such a fear. This reasonable belief may be established either by proving the decedent was in fact a person of violent character, and that his character was known to appellant, Marts v. State, supra, or by proving that others had

informed her, prior to the killing, of violent acts of the victim. McCary v. State, supra. Only in the former case must appellant establish the decedent's character. With regard to appellant's proffered testimony, she sought to prove her reasonable belief through the latter method.

Since appellant's testimony was not offered to prove the decedent's character or that he acted in conformity therewith, but rather only as evidence of appellant's state of mind, Evid. Rules 404 and 405, prohibiting proof by evidence of specific acts, do not apply.[3/] Consequently, appellant's proffered testimony being relevant, the trial court erred in prohibiting said testimony.

Similarly, appellant sought to introduce the testimony of decedent's former wife, Christina Goldsbey describing various specific instances of violent behavior on the part of the decedent during which he beat his former wife. Appellant further sought to testify that decedent's former wife had informed appellant of these beatings prior to the shooting.[4/] Appellant sought to introduce this evidence for two purposes: (1) to establish that decedent was the initial aggressor and (2) to establish reasonable grounds upon which appellant based her fear of great bodily harm or loss of life.

3/ Evid. R. 404(A) provides in pertinent part as follows:

"(A) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, subject to the following exceptions:" (Emphasis added) See also Staff Note to Evid. R. 404.

4/ Defense counsel proffered an affidavit of Christina Goldsbey in which she stated she knew the decedent as being "a person of violent and uncontrollable temper," and in which she enumerated six separate occasions on which decedent physically beat her. Goldsbey further stated in her affidavit she "relayed the word to Debbie [appellant] what I knew about Herman [decedent], ..."

In accordance with the above discussion, the proffered evidence of prior specific instances of conduct is not admissible for the first purpose, but is admissible for the second.

The excluded evidence, however, was cumulative of appellant's extensive testimony relating to her first-hand knowledge of the violent character of her husband. (Tr. 237-298, 330-337) The jury was presented with a great deal of evidence relating to the reasonableness of appellant's fear for her life, in the form of appellant's testimony, the testimony of her friend, Kim Marcano, and the testimony of her sister, Linda Buford. Since the excluded evidence was cumulative in nature, its exclusion by the trial court did not constitute error prejudicial to

treatment.[5] Appellant further argues the report is admissible under Evid. R. 803(6), the business records exception.[6] This exception to the hearsay rule, however, requires that the information be supplied in the usual course of business to the person recording it as well as requiring the information be recorded in the usual course of business. Otherwise, the information supplied is deemed unreliable unless it is supplied in a form itself recognized as an exception to the hearsay rule.[7]

5/ Evid. R. 803(4) provides the following exception to the hearsay rule:
"(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

6/ Evid. R. 803(6) provides the following exception to the hearsay rule:
"(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

7/ Hytha v. Schvendeman (1974), 40 Ohio App. 2d 478. See Staff Note to Evid.R. 803(6) and Advisory Committee's Note to Fed. Evid.R. 803(6) which provides in pertinent part as follows:
"Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail."

The claim is made that in the instant case the information was supplied to Dr. Schwartz by the decedent as statements made for purposes of treatment and diagnosis, and thus these statements are included under the Evid.R. 803(4) exception to the hearsay rule. An examination of the report, however, fails to indicate that any statements contained therein relative to the decedent's aggressive character were [illegible] by the decedent. To the contrary, it appears the decedent denied the violent nature of his character and, further, that any such statements made to Dr. Schwartz were made by the decedent's wife, the appellant.[8]

The report of Dr. Schwartz is hearsay. It is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Since the report does not fall under any recognized exception to the hearsay rule, it is inadmissible and was properly excluded by the trial court.[9]

Further under the first assignment of error, appellant contends the following testimony should have been admitted during the direct examination of appellant:

8/ In Dr. Schwartz' report, it appears the decedent did admit he had "fights and arguments" with his first wife, but he also claims his first marriage was happy and that he divorced his first wife because of her infidelity.

9/ Evid.R. 802 provides as follows:
"Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio."

"His nephew ran upstairs and tried to pull him off of me.

"Q. Which nephew?

"A. Larry Shoulders, and tried to pull him off me. And Larry finally got him calmed down.

"He [decedent] said, "No, I am going to take care of her. I am going to take care of her," and they were running down the steps, and then I heard Larry say, 'No, put the gun up.'" (Emphasis added) (Tr. 283).

The trial court sustained the prosecutor's objection to the statement allegedly made by the nephew relating to the gun as being hearsay. As discussed above, Evid.C. §801(c), defines hearsay as an out of court statement offered to prove the truth of the matter asserted. It is clear from the record the proffered evidence relating to the statement allegedly made by the decedent's nephew was not offered to prove that decedent did in fact have a gun. Rather, the statement was offered to prove only that such a statement was in fact made; it was relevant to show appellant's state of mind upon hearing the conversation between her husband and his nephew relating to the husband's possession of a gun.[10/] Thus, regardless of how unreliable appellant's testimony in this regard may have been in the eyes of the court, it was not hearsay and it was relevant. It should have been admitted in order to provide the jury the opportunity to pass upon its credibility, and it was error for the trial court to exclude it. This

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10/ Counsel for appellant included the following statement in his proffer of the excluded evidence:

"I think that's very relevant to this, the fears of this young lady, and I think it goes directly to her testimony, that she was afraid that he was going to get the gun and come back upstairs and shoot her on the [illegible]

evidence too, however, is merely cumulative of the extensive evidence already before the jury relating to the reasonable [illegible] of appellant's fear of her husband. Thus, its exclusion does not constitute reversible error.

Finally under the first assignment of error, appellant contends the decedent's probation officer should have been permitted to testify that appellant reported to him [illegible] of the beatings admitted into to her husband. It is alleged this testimony would show the legitimacy of appellant's fear of her husband. Thus, it is clear said testimony was offered to prove the truth of the matter asserted by appellant in her reports to the probation officer. Consequently, these statements made by appellant, out of court, constituted hearsay and were properly excluded.

Appellant's first assignment of error is not well taken.

III.

In her second assignment of error, appellant contends the court erred in charging the jury with respect to the issue of who was the aggressor in the affray between appellant and her husband. In this respect the court charged as follows:

> "The law does not measure nicely the degree of force which may be used to repel an assault. However, if a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances, and if the force used is so greatly disproportionate to her apparent danger as to show revenge or an evil purpose to injure her assailant, then the defense of self-defense is not available.
>
> "The Defendant must prove that the other party was the aggressor and that the Defendant did not provoke or cause the death. The plea of self-defense is not available to a person who starts a fight, unless in good faith, she withdraws from the contest and informs the other party of her withdrawal, or by words or acts reasonably indicates that she has withdrawn and is no longer participating in the fight.
>
> "A Defendant is not in a position to claim self-defense if she sought trouble and came armed with a dangerous weapon, renewed a fight and did not attempt to avoid it or leave the scene of the trouble.
>
> "If, in the careful and proper use of her faculties, the Defendant honestly believed or had cause to believe and reasonable grounds to believe that her assailant was not able and did not intend to kill or do great bodily harm to her, then the Defendant's notice of her adversary's position -- if in the careful and proper use of her faculties the Defendant honestly believed and had reasonable grounds to believe that her assailant was not able and did not intend to kill or do great bodily harm to her, then the Defendant, having notice of her adversary's position, was released from the danger and the right to use force in self-defense ended.
>
> "If thereafter the Defendant continues to fight, she becomes the aggressor, and a subsequent injury to another is unlawful." (Emphasis added) (Tr. 521-523)

Although appellant objected to only the emphasized portions of the charge, (Tr. 526), the entire charge of the court with reference to the issue of who was the aggressor is in accord with both law and the evidence. It is incumbent upon a defendant claiming self-defense to establish he was not the aggressor and to further establish he was unable to safely avoid the use of deadly force. State v. Robbins [illegible], 25 Ohio St. 2d. The evidence in the instant case establishes appellant purchased a hand gun several weeks prior to the fatal confrontation with her husband, subsequent to her filing for divorce, and that she first placed the revolver in a dresser drawer in the couple's bedroom and later placed the gun underneath a pile of clothes beneath the bed. (Tr. 326-329, 353-362) The evidence further established that several days prior to the shooting appellant informed her husband of the pending divorce action; on the morning of the shooting, in their bedroom, appellant and her husband began to argue over money; that the unarmed husband struck appellant knocking her to the bed, that appellant kicked her husband away, reached for the gun and came up firing. (Tr. 302-303, 338-340) Further, the evidence established the fatal shot struck appellant on the left side below the armpit, that the trajectory of the bullet was from back to front, left to right and upwards, and that appellant continued to fire at her husband, after he was shot, as he left the bedroom and made his way down the stairway. (Tr. 31-32; 62-66; 339-340; 377-384)

From the evidence, then, the jury could have concluded that at some point in the affray appellant was or became the aggressor under the charge given by the court.

Accordingly, appellant's second assignment of error is not well taken.

IV.

Appellant's third, fourth, sixth and seventh assignment of error are interrelated and shall be discussed together.

In the fourth assignment of error, appellant challenges the sufficiency of the state's evidence to support a verdict of guilty of voluntary manslaughter. In the sixth assignment of error, appellant challenges the standard employed by the court in denying appellant's Crim.R. 29 motion for acquittal and determining sufficient evidence existed to send the case to the jury.[11/]

The proper standard to determine whether a Crim. R. 29 motion should be granted is whether there exists sufficient evidence, if believed, to permit the jury to determine the state has established each element of the offense charged beyond a reasonable doubt, State v. Vaught (1978), 56 Ohio St. 2d 93; i.e., whether "reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." State v. Bridgeman (1978), 55 Ohio St. 2d 261.

11/ Criminal Rule 29(A) provides as follows:

"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judg-

Appellant was convicted of voluntary manslaughter the essential elements of which are knowingly causing the death of another.[12/] Thus, sufficient evidence to support the conviction exists if reasonable minds could conclude upon the evidence that these two elements were established beyond a reasonable doubt.

There is no question the death of Herman Washington was proximately caused by appellant. Appellant testified she shot her husband with the gun she had purchased to defend herself from him. Robert Harden further testified the decedent was shot while in the bedroom with appellant, and that he, Harden, saw appellant holding the gun. The testimony of the assistant county coroner established that Herman Washington died from the gunshot wound admittedly inflicted by appellant. (Tr. 32; 62-66, 339-340)

Appellant contends, however, in her third and seventh assignment of error, that the state also must prove beyond a reasonable doubt that appellant did not act in self-defense. In arriving at this conclusion, appellant contends R.C. 2901.05(A) improperly places the burden of proving self-

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12/ R.C. 2903.03(A) defines voluntary manslaughter as follows:

"(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another."

That appellant acted under extreme emotional stress sufficient to incite her into the use of deadly force is not an essential element of the crime of voluntary manslaughter, but is rather a mitigating factor. State v. Mabe[illegible] (1973), 55 Ohio St. 2d 201.

defense by a preponderance of the evidence upon appellant.[13/] Appellant contends the state has failed in carrying its burden to establish the lack of self-defense and further that the court improperly instructed the jury regarding this burden.

This court recently addressed the identical sufficiency argument, based upon the state's failure to carry its alleged burden with respect to the affirmative defense of self-defense, as appellant now puts forward, and found the same to be without merit. State v. Johnson (Cuyahoga Ct. of Appeals No. 42846, July 16, 1981), unreported. Based upon the reasoning contained in Patterson v. New York (1977), 432 U.S. 197, and upon prior decisions of this Court relative to the burden of proof of affirmative defenses,[14/] the court in Johnson determined R.C. 2901.05(A) did not unconstitutionally shift the burden of proving self-defense to the defendant, since the affirmative defense does not negate an essential element of

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13/ R.C. 2901.05 provides, in pertinent part, as follows:

"§2901.05 Burden and degree of proof.

"(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

* * *

"(C) As used in this section, an 'affirmative defense' is either of the following:

"(1) A defense expressly designated as affirmative;

"(2) A defense involving an excuse of justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence. ***" (Emphasis added).

14/ See, State v. Nesell (December 28, 1979), _____Ohio App. 2d _____, Cuy. Ct. of Appeals No. 40470; State v. Callahan (Cuy. Ct. of Appeals No. 41737, December 11, 1980), unreported; State v. Britton (March 27, 1980), _____Ohio App. 2d ____, Cuy.Ct. of Appeals No. 40644, See also, State v. Francis (Cuy. Ct. of Appeals No. 41972 and 41973, Oct. 23, 1980), unreported and State v. Gober (Cuy. Ct. of Appeals No. 42974, May 7, 1981), unreported.

the crime of voluntary manslaughter.[15/]

Johnson held as follows:

> "We conclude that the appellant had the burden of proving, by a preponderance of the evidence, the affirmative defense of self-defense. The state had no burden on this issue." (Footnote omitted) Slip op. at P. 9.

Since the state has no burden on the issue of self-defense, the sufficiency of the evidence establishing the commission of the crime of voluntary manslaughter by appellant cannot be tested by reference to the evidence adduced upon said issue. The state need only establish, through evidence which, if believed, would permit reasonable minds to determine appellant's guilt beyond a reasonable doubt, that appellant [illegible] the crime of voluntary manslaughter. The [illegible] of self-defense [illegible] sufficiency [illegible] manslaughter [illegible] self-defense [illegible] Johnson [illegible] Slip op. at P. 9, footnote [illegible] Johnson [illegible] was not all taken.

[illegible] (March 5, 1979), unreported, [illegible] in light of State v.

V.

Since appellant bears the burden of proving self-defense, the verdict in the instant case is sustained by the evidence unless it appears the verdict is contrary to the manifest weight thereof. State v. Robinson (1955), 162 Ohio St. 486.

In her fifth assignment of error, appellant argues the jury must have concluded appellant's fear for her life was unreasonable. Appellant contends, had the jury found appellant's fear reasonable, they necessarily must have found the killing was justifiably done in self-defense and, therefore the jury would have been required to acquit appellant. Thus, appellant reasons, since the evidence overwhelmingly established the reasonableness of appellant's fear of her violence-prone husband, the jury's verdict is contrary to the weight of the evidence. This argument lacks merit.

In order to prove self-defense, appellant must establish more than a reasonable fear for her life or physical safety:

> "To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger. (State v. Melchior, 56 Ohio St. 2d 15, approved and followed.)"
>
> State v. Robbins (1979), 58 Ohio St. 2d 74, paragraph 2 of the syllabus.

Thus, while the jury may have found appellant's fear to be reasonable, it is quite possible the jury found appellant had failed to establish one or more of these additional elements.

Further, under the evidence, it was possible for the jury to determine appellant's fear was unreasonable.

The decedent's niece testified that appellant stated on the night before the shooting: "One day you [the niece] are going to wake up and find your uncle [Herman Washington] is going to be dead." (Tr. 409) Robert Harden, the nephew, testified that on the morning of the shooting, he heard appellant [illegible] he heard the yelling [illegible] screaming. (Tr. 74) Further, although appellant testified her husband struck her hard enough to leave marks or bruises on that morning (Tr. 370-371), neither the police, nor Robert Harden, nor Howard Van Lear, the man who took appellant to the phone booth to call the police, saw any cuts or bruises on appellant. (Tr. 74, 96, 109) The evidence further showed appellant purchased the hand gun for protection from her husband, loaded it, and secreted it under the bed after her husband had threatened her, less than two weeks before the shooting. (Tr. 354-361) Based upon this evidence, the jury could have properly concluded no serious beating occurred that morning sufficient to instill a reasonable fear of death or great bodily harm in appellant, and further, the use of deadly force was unnecessary to protect appellant's life. The jury could have properly concluded appellant had been pushed too far, had prepared herself for the next physical attack by Herman Washington, and had reacted with an unjustifiable use of deadly force.

Accordingly, it cannot be said that the verdict of the jury is so contrary to the manifest weight of the evidence as to require reversal of the trial court's judgment.

Appellant's fifth assignment of error is not well taken.

No error prejudicial to appellant having been found, the judgment of the trial court is affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PATTON, P.J. and

CORRIGAN, J. CONCUR.

(* Stillman, J., Retired Judge, sitting by assignment)

JUDGE
* SAUL G. STILLMAN

For plaintiff-appellee: John T. Corrigan
For defendant-appellant: James R. Willis

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the Court and time period for review will begin to run.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 45650

STATE OF OHIO :

Plaintiff-Appellee :

: JOURNAL ENTRY

v. : AND

: OPINION

WALTER WILSON :

Defendant-Appellant :

DATE OF ANNOUNCEMENT OF DECISION: JUN 23 1983

CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas Case No. 165101

JUDGMENT: Affirmed

DATE OF JOURNALIZATION: _____

APPEARANCES:

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Cleveland, Ohio 44113

For Defendant-Appellant:

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Defendant-appellant was tried before a jury and convicted of murder. We affirm for the reasons set forth in this opinion.

Appellant Walter Wilson operated a grocery store located across the street from a cleaners operated by the victim, Quinton Lumpkin. Appellant was buying the building in which the cleaners was located. On the day of the incident, one of the appellant's employees taped an envelope containing an eviction notice on the door of the victim's business establishment.

A few minutes later Lumpkin entered appellant's store. Wilson testified that because he saw a gun in Lumpkin's pocket, he (Wilson) tucked his pistol into the back of his pants. Lumpkin had the envelope in his hand and was angrily questioning Wilson about it. Wilson told Lumpkin that he could not talk to him about it during business hours. Lumpkin became very angry and continued arguing and swearing loudly.

Wilson had learned in the neighborhood that Lumpkin had shot and killed a man in the past. Some witnesses, including Wilson, testified that Lumpkin reached for his gun when Wilson pulled out his pistol and fired four times. Three of these shots hit the victim. The victim had crawled behind a wooden potato chip rack to flee and was struggling to his feet. Wilson then picked up his .12 gauge shotgun from the shelf near the cash register and fired it through the shelf. The shotgun bullet hit the victim in the throat and was the only fatal shot fired. The victim had a pistol with bullets that were in the clip (handle) and were not placed in the chamber from which they could be fired. The victim had fired no shots.

Appellant raises several assignments of error.

I. AN ACCUSED IS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN (A) HIS TRIAL COUNSEL FAILS, DESPITE A CLEAR CONSTITUTIONAL BASIS FOR DOING SO, TO PERCEIVE, RAISE AND PRESERVE CERTAIN CRITICAL ISSUES WITH REFERENCE TO THE VARIOUS BURDENS OF PERSUASION INVOLVED IN THE CASE, AND (B) HIS TRIAL COUNSEL FAILS TO REQUEST INSTRUCTIONS CRITICAL TO HIS DEFENSE.

In determining whether a defendant was denied effective assistance of counsel, the Ohio Supreme Court has ruled that the test is whether the accused, under all the circumstances, had a fair trial and whether substantial justice was done. State v. Hester (1976), 45 Ohio St. 2d 71. This test was further developed by the court in State v. Lytle (1976), 48 Ohio St. 2d 391, where it set forth a two step process:

> First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendments rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness. Id. at 396-397.

A licensed attorney is presumed to have competently and properly represented the client. Vaughn v. Maxwell (1965), 2 Ohio St. 2d 299; Lytle, supra. The burden of proving ineffective assistance of counsel is on the defendant and it is a heavy one. State v. Smith (1981), 3 Ohio App. 3d 115. We hold that appellant has not sustained this burden.

Appellant argues that his attorney failed to request the court to instruct the jury that he had no duty to retreat.

The court gave the following instruction:

> If a person is assaulted by another, who apparently intended to kill or cause great bodily harm, the person assaulted is not required to retreat, but may repel force with force and kill his assailant, if it reasonably appears to the defendant, necessary to do so. (R. 347).

Appellant further contends that the prosecutor made statements in his closing argument that led the jury to believe that the appellant had a duty to retreat, and that his counsel's failure to object to these statements amounted to ineffective assistance of counsel. We disagree. The prosecutor prefaced these statements by informing the jury that nothing he said is law. Even if the failure to object had been a violation of the counsel's duty, there was no prejudice to appellant. The court instructed the jury that the law given by the court must be followed and appellant had no duty to retreat. Appellant's testimony indicated that he believed he could not have retreated without receiving serious harm.

Appellant finally argues that his counsel should have requested the court to instruct the jury that where a man is feloniously attacked in his place of business, he would be justified in standing his ground and in using deadly force. We find that the above instruction did inform the jury that if an accused is assaulted with apparent felonious intent, he is justified in standing his ground and in using deadly force. Hence, we find that his counsel did not breach his duty by failing to request an instruction on information already covered by the court.

The first assignment of error is without merit.

II. THE COURT ERRED, AND THE DEFENDANT WAS GREVIOUSLY[sic] DENIED DUE PROCESS OF LAW, BY VIRTUE OF THE PRESENCE OF CERTAIN FUNDAMENTAL DEFECTS IN THE VARIOUS INSTRUCTIONS UNDER WHICH THE MURDER CHARGE, THE INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, AND THE ISSUE OF SELF DEFENSE WERE SUBMITTED TO THE JURY.

(C)

A STATE MAY NOT CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IMPOSE ON A DEFENDANT IN A CRIMINAL TRIAL THE BURDEN OF PERSUASION WITH RESPECT TO THE PLEA OF SELF DEFENSE.

(D)

A STATE CANNOT CONSTITUTIONALLY PROVIDE AN ACCUSED WITH WHAT AMOUNTS TO A DEFENSE TO A CRIMINAL HOMICIDE CHARGE AND THEN REQUIRE THAT IT BE PROVEN BEYOND A REASONBLE DOUBT BY THE PROSECUTION - OR EVEN THE DEFENDANT FOR THAT MATTER.

These assignments of error are treated together because under each one appellant argues that the Due Process Clause of the United States Constitution is violated when a defendant is required to prove self defense by a preponderance of the evidence. We disagree.

Self defense is an affirmative defense. R.C. 2901.05(C)(2);[1]

1/ R.C. 2901.05 provides in pertinent part as follows:

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

* * *

(C) As used in this section, an "affirmative defense" is either of the following:

* * *

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

State v. Poole (1973), 33 Ohio St. 2d 18. R.C. 2901.05(A) places the burden of proving an affirmative defense by a preponderance of the evidence upon the defendant. Based upon the reasoning in Patterson v. New York (1977), 432 U.S. 197, this court has consistently held that R.C. 2901.05(A) does not unconstitutionally shift the burden of proof to the defendant if the affirmative defense does not negate an essential element of the crime charged. State v. Henderson (Ct. App. Cuy. Cty., December 17, 1981), Unreported Case No. 43489; State v. Newell (Ct. App. Cuy. Cty., December 28, 1979) Unreported Case No. 40470.[2] The Ohio Supreme Court has also ruled that it is not unconstitutional to require a defendant to prove an affirmative defense by a preponderance of the evidence. State v. Frost (1979), 57 Ohio St. 2d 121, 126-127.

In the case at bar, appellant was charged with murder. The elements of murder are purposely causing the death of another. By asserting self-defense, one admits a purposeful killing but seeks to justify the act. The defense therefore does not negate any elements of the crime. Therefore, it is constitutionally permissible to require an accused to bear the burden

2/ See also, State v. Jones (Ct. App. Cuy. Cty. March 17, 1983) Unreported Case No. 45236; State v. Washington (Ct. App. Cuy. Cty. October 15, 1981) Unreported Case No. 43219; State v. Johnson (Ct. App. Cuy. Cty. July 16, 1981), Unreported Case No. 42846; State v. Britten (Ct. App. Cuy. Cty. March 27, 1980) Unreported Case No. 40644.

of proof by a preponderance, and it is not error to so instruct the jury. Appellant does not refer us to any other "fundamental defects" in the instructions. The first and fourth portions of appellant's second assignment of error are overruled.

II. THE COURT ERRED, AND THE DEFENDANT WAS GREVIOUSLY[sic] DENIED DUE PROCESS OF LAW, BY VIRTUE OF THE PRESENCE OF CERTAIN FUNDAMENTAL DEFECTS IN THE VARIOUS INSTRUCTIONS UNDER WHICH THE MURDER CHARGE, THE INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, AND THE ISSUE OF SELF DEFENSE WERE SUBMITTED TO THE JURY.

(B)

IN A MURDER PROSECUTION WHEN THE COURT CHARGES THE JURY THE INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER MUST BE PROVEN BEYOND A REASONABLE DOUBT, THE EFFECT OF SUCH AN INSTRUCTION IS TO IMPOSE ON THE DEFENDANT (WHO WOULD BE THE BENEFICIARY OF THE INSTRUCTION) THE BURDEN OF PROVING THE OFFENSE WAS ONLY MANSLAUGHTER BEYOND A REASONABLE DOUBT OR SUFFERING A MANSLAUGHTER CONVICTION.

(C)

WHERE THE TRIAL JUDGE IN A MURDER PROSECUTION GIVES THE JURY A CLEARLY ERRONEOUS INSTRUCTION, ONE THE JURY COULD ONLY REASONABLY UNDERSTAND AS TELLING THEM THEY SHOULD NOT CONSIDER THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER IF THEY WERE CONVINCED THE STATE HAD PROVED THE CHARGED MURDER OFFENSE, EVEN IF THE COURT ELSEWHERE IN ITS OVERALL CHARGE ALSO GIVES THE JURY ACCURATE INSTRUCTIONS (RHETORICALLY INCONSISTENT WITH THE INCORRECT, AND UNCONSTITUTIONAL, UNDERSTANDING THEY COULD HAVE OBTAINED FROM THE ERRONEOUS INSTRUCTIONS) ANY CONCLUSION THAT THE CHARGE AS A WHOLE CLEARLY INFORMED THE JURY OF THE CORRECT LEGAL PRINCIPLES INVOLVED WOULD BE ARBITRARY AND WOULD VIOLATE DUE PROCESS.

Under both parts of this assignment of error, appellant objects to the jury instructions dealing with manslaughter; therefore, the two will be discussed together. Appellant's counsel did not object to these instructions at trial. The failure to timely object to a jury instruction constitutes a waiver thereto. Crim. R. 30; State v. Long (1978), 53 Ohio St. 2d 91. Appellant argues that his counsel's failure to object to the instructions was a result of ineffective assistance of counsel; therefore, we should examine the instructions on appeal. A review of the court's charge reveals no prejudicial effect amounting to plain error under Crim. R. 52(B). The instructions complied with the requirements set forth in State v. Muscatello (1977), 57 Ohio App. 2d 231, aff'd., (1978), 55 Ohio St. 2d 201.

In part (C) of this assignment, appellant in very confusing language, appears to argue that the trial court erred in instructing the jury that if it could not agree that the State proved the crime of murder, then it must begin deliberations on manslaughter. We find that the instructions were in accordance with Ohio law. In State v. Muscatello, supra, this court ruled that it is improper for a court to instruct the jury that it must unanimously agree that the defendant is not guilty of aggravated murder before considering the lesser charge of voluntary manslaughter. No such instruction was given in the case at bar.

The portion of the instruction objected to by appellant was the following statement.

> If the jury cannot agree, that the State has proved beyond a reasonable doubt that a purposeful killing was committed, then you must begin your deliberations as to the lesser included offense of voluntary manslaughter. (R. 342).

This court has held that the correct rule of law is that, if a jury is unable to agree unanimously that a defendant is guilty of a particular offense they may proceed to consider a lesser included offense. State v. Muscanello, supra. The second and third sections of appellant's second assignment of error are without merit.

III. THE PROVISIONS OF R.C. OF OHIO, §2901.05(A) TO THE CONTRARY NOTWITHSTANDING, DUE PROCESS IS VIOLATED WHEN THE COURT INSTRUCTS THE JURY THAT THE DEFENDANT MUST PROVE HIMSELF TO BE INNOCENT OF THE CHARGE AGAINST HIM.

Although in this assignment of error appellant states that he was required to prove himself innocent, he actually objects again to the instruction that requires an accused to bear the burden of proof on the issue of self defense. We ruled under the second assignment of error that the Supreme Court of Ohio has ruled that it is correct to instruct the jury that the defense must prove affirmative defenses by a preponderance of evidence, and we also ruled that self defense is an affirmative defense. This assignment of error is without merit.

IV. THE COURT ERRED IN DENYING THE DEFENDANT'S POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL.

A court shall not enter a judgment of acquittal pursuant to Crim. R. 29(A) if the evidence presented is such that reasonable minds can reach different conclusions as to whether each material element of the crime has been proven beyond a reasonable doubt. State v. Bridgeman (1978), 55 Ohio St. 2d 261. Several witnesses, including appellant, testified about the events leading up to the shooting. Expert testimony and physical evidence were presented. We have reviewed the record and we hold that there was sufficient evidence upon which reasonable minds could conclude that appellant purposely caused the death of Quinton Lumpkin. Thus, there was sufficient evidence that reasonable minds could determine that each material element of the crime of murder was proved beyond a reasonable doubt. The fourth assignment of error is not well taken.

V. THE DEFENDANT WAS DENIED DUE PROCESS WHEN THE TRIAL JUDGE (1) REJECTED THE REQUEST FOR AN EVIDENTIARY HEARING ON AN ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL AND (2) SUMMARILY DENIED THE DEFENDANT'S APPLICATION FOR A NEW TRIAL WITHOUT HAVING MADE ANY OF THE CRITICAL FINDINGS REQUIRED.

After the trial a hearing was held on appellant's motions for acquittal and for a new trial. Appellant had requested that his previous counsel withdraw from the case, hence was represented by a different attorney at this hearing. Appellant again argued at the hearing that he was denied effective assistance of counsel because his attorney had not objected at trial to

the court's instruction on self defense. Appellant also asserted that his attorney had difficulty hearing the witnesses at trial. There is no evidence in the record that his counsel was unable to hear the testimony. The court found that appellant had been adequately represented and denied the motions.

If the record demonstrates the absence of facts that would entitle the accused to relief for ineffective assistance of counsel, the trial court may so find without granting an evidentiary hearing. State v. Hawkins (Ct. App. Cuy. Cty., March 27, 1980), Unreported Case No. 41101. See also, State v. Perry (1967), 10 Ohio St. 2d 175. We found when ruling on the first assignment of error that there was no evidence in the record of ineffective assistance of counsel. At the hearing for a new trial the lower court stated that it clearly remembered the trial, which had taken place little more than a month prior to the hearing, and that there was no evidence of ineffective assistance of counsel. At the hearing, appellant almost exclusively based his argument on the fact that counsel had failed to object to the court's instruction that an accused must prove self defense by a preponderance of the evidence. The Supreme Court of Ohio has upheld the charge on affirmative defenses and we have repeatedly followed that ruling (see pp. 5 and 6 of this opinion). We find no error in counsel's failure to object to an instruction of law that has been consistently upheld by the Ohio courts.

Appellant incorrectly relied on United States v. DeCoster (1973), 487 F. 2d 1197 to support his contention that he was entitled to an evidentiary hearing on the issue of ineffective assistance. In that case the record raised serious questions about the counsel's litigation skills, and the court remanded the case back to the trial court for a hearing to investigate counsel's effectiveness. In the case before us, the record of the trial as well as the record of the hearing provide sufficient evidence for a conclusion that counsel adequately represented appellant, and appellant's arguments did not indicate any possibility that information outside the record would demonstrate otherwise. Appellant's final assignment of error is overruled.

The judgment of the lower court is affirmed.

OPPOSITION BRIEF

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83-6759
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BETTY MORAN

Petitioner

vs.

THE STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

I

Whether Due Process Permits a State to Place the Burden of Proving the Affirmative Defense of Self-Defense Upon the Accused.

II

Whether Due Process Permits a State to Require that an Accused Establish that the Victim was the Aggressor When Raising a Claim of Self-Defense.

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Reason No. I:

The Constitution Permits a State to Place the Burden of Proving the Affirmative Defense of Self-Defense Upon the Accused.

Reason No. II:

Due Process Permits a State to Require that the Accused Establish that the Victim was the Aggressor When Raising a Claim of Self-Defense.

Conclusion 8

Appendices: State v. Britten (Cuy. Cnty. Ct. App., March 27, 1980) unreported case no. 40644
State v. Johnson (Cuy. Cnty. Ct. App., July 16, 1981) unreported case no. 42846
State v. Washington (Cuy. Cnty. Ct. App., October 15, 1981) unreported case no. 43219 cert. den. sub nom.
State v. Walter Wilson (Cuy. Cnty. Ct. App., June 23, 1983) unreported case no. 45650 cert. den. sub nom.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BETTY MORAN

Petitioner

vs.

THE STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS CUYAHOGA COUNTY, OHIO

To: The Honorable, the Chief Justice and the Associate Justices of The Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions invloved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reasons that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

Defendant-petitioner, Betty Moran, was indicted by a Cuyahoga County Grand Jury for the Aggravated Murder of her husband, Willie Moran, a violation of Ohio Revised Code Section 2903.01. After a jury trial, Petitioner was found guilty of Murder and sentenced to fifteen years to life.

On October 27, 1983, the Eighth District Court of Appeals affirmed Petitioner's conviction and sentence. Petitioner Moran filed a Memorandum seeking jurisdiction in the Supreme Court of Ohio. The State Supreme Court denied jurisdiction on March 21, 1984. The present petition for writ of certiorari to the Eighth District Court of Appeals followed.

STATEMENT OF FACTS[1]

During the afternoon of Friday, May 15, 1981, the defendant-petitioner and her husband, Willie Moran, had a argument about money to pay the bills for the B & W Towing business that they jointly owned at 7209 Euclid Avenue in Cleveland, Ohio (R. 16, 73, 100, 116, 214). Shortly after the argument in the office, Willie went into the bedroom of the house trailer that was attached to the rear of the towing office (R. 102). Willie lived in the trailer while the defendant lived with their children at their 17104 South Miles residence (R. 82, 213).

According to the written statement given to the police and her own testimony, the defendant went into the bedroom and after another argument with her husband, who had then gotten in the bed to take a nap, she fixed him a drink of honey, whiskey and lemon. He then ordered her to have the money by the time he awakened. The defendant went into the office and "sat there and thought about it". Then she went back into the bedroom picked up a gun by the bed and began firing into the victim's back. She reloaded the gun and shot two or three more times (R. 131). When the first one hit him, he rolled over on his back. He said, "What the hell are you doing? Call an ambulance. I hate you." (R. 131)

[1] References to the transcript of the proceedings will be designated by the prefix "R".

The defendant then walked into the office and told her mother. Then she left to throw the gun in Gordon Park. The defendant said her daughter was going to the prom that night and she wanted to be home. On the next day she carried on business as usual. On Sunday she met a girlfriend, Eva McKinley, and together they hired Richard Rohn and another man to place the victim's body in the trunk of the victim's car. Rohn had earlier informed the Cleveland Police Department of the plan which took place Sunday about midnight (R. 17-19).

However, unbeknown to the police, the defendant, Eva, and the man, left the tow lot in two automobiles and transported the body to a location in Edenborough, Pennsylvania. The highway patrol located the vehicle and the body after the Cleveland detectives obtained a statement from the defendant.

The cause of death was due to a "shattered left lung". The pathologist identified seven wounds on the decomposed body, four of which were entry wounds to the left portion of the back and the left chest (R. 152-156).

Gill Taylor, an employee for the tow company, testified that he last saw the victim that Friday morning when he reported to work. He further testified that he didn't see the victim that Sunday when he reported to work again (R. 81).

The detective testified that when they arrived on the scene the following Monday morning, that they discovered a trail of blood in the trailer (R. 117-118).

Defendant then offered testimony of her employees that substantiated the testimony of the State's witnesses. She then presented testimony of the arguments between her and the victim. Defendant took the stand and collaborated the written statement given to the police and stated that she shot the victim.

REASONS FOR DENYING THE WRIT

I. The Constitution Permits a State to Place the Burden of Proving the Affirmative Defense of Self-Defense Upon the Accused.

II. Due Process Permits a State to Require that the Accused Establish that the Victim was the Aggressor When Raising a Claim of Self-Defense.

Petitioner raises essentially the same issues in her assertions I and II; therefore, both will be addressed together.

Before addressing Petitioner's second claim, the State would like to point out that this assignment of error attacking the placement of the burden of proof for self-defense has been brought before this Supreme Court by this defense counsel on previous occasions, and the Petition for Writ of Certiorari was denied. See e.g. State v. Walter Wilson (Cuy. Cnty. Ct. App., June 23, 1983), unreported case no. 45650, cert. den. sub. nom., Wilson v. U.S., 52 U.S.L.W. 3602; State v. Washington (Cuy. Cnty. Ct. App., October 15, 1981), unreported case no. 43219, cert. den. sub. nom., Washington v. Ohio, _____U.S._____ 73 L. Ed. 2d 1319 (1982). The Petition for Writ of Certiorari in Betty Moran's case should likewise be denied.

The petitioner's due process rights were not violated by requiring her to prove by a preponderance of the evidence that she acted in self-defense. In Ohio, self-defense is an affirmative defense. State v. Poole, 33 Ohio St. 2d 18 (1973). The Ohio legislature has placed the burden of proving self-defense upon the accused in Ohio Revised Code Section 2901.05:

> 2901.05 Burden and degree of proof.
>
> (A) Every person assused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.
>
> * * *
>
> (C) As used in this section, an "affirmative defense" is either of the following:
>
> (1) A defense expressly designated as affirmative;
>
> (2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

Thus, the State legislature has mandated that the burden of justifying a murder with a claim of self-defense be on the defendant.

The Ohio Supreme Court has held that it is not unconstitutional to require a defendant to prove an affirmative defense by a preponderance of the evidence. State v. Frost, 57 Ohio St. 2d 121, 126-127 (1979). Further, it has been held that Ohio Revised Code Section 2901.05(A) does not unconstitutionally shift the burden of proof to a defendant if the defense does not negate an essential element of the crime charged. State v. Davis, 8 Ohio App. 3d 205 (1982). In Davis, defense counsel (the same person acting as defense counsel in the instant petition) alleged the same constitutional violation, i.e., that the State should have the burden of proving that an accused did not act in self-defense. In overruling Davis's assertion and affirming his conviction, the Appeals court stated:

> This court has repeated- (209) ly held that Ohio's criminal code constitutionally assigns that burden of proof to the defense. Those decisions have never suggested that a defendant asserting self-defense has the burden of proving himself innocent. Rather, self-defense is an affirmative defense which justifies otherwise unlawful conduct; the absence of that justification is not an element of crimes set forth in R.C. Chapter 2903. Cf. State v. Frost (1979) 57 Ohio St. 2d 121 (11 O.O. 3d 294).

In Engle v. Isaac (1982), 71 L. Ed. 2d 783, the United States Supreme Court stated, at page 797, that the argument against this assignment of the burden of proof asserts "a colorable constitutional claim." However, the court's opinion concluded at page 795:

> A careful review of our prior decisions reveals that this claim is without merit. Our opinions suggest that the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the state defines the charged crime. Compare Mullaney v. Wilbur (1975), 421 U.S. 684, supra, with Patterson v. New York (1977), 432 U.S. 197, supra. (footnote omitted.)

Davis, at 208, 209. The Davis court's ruling is based on a logical interpretation of Issac, Mullaney and Patterson, and is consistent with many cases which have previously addressed the self-defense issue.[2] Placing the burden of proving self-defense upon the person claiming self-defense does not violate constitutional

[2] See also, State v. Washington (Cuy. Cnty. Ct. App., October 15, 1981), unreported case no. 43219, cert. den. sub nom., Washington v. Ohio U.S. , 73 L. Ed. 2d 1319 (1982); State v. Johnson (Cuy. Cnty. Ct. App., July 16, 1981), unreported case no. 42846; State v. Britten (Cuy. Cnty. Ct. App., March 27, 1980), unreported case no. 40644.

due process. Petitioner's second claim lacks constitutional merit.

Petitioner's claim seems to be based upon an erroneous reading of Patterson and Isaac. Petitioner tries to distinguish Patterson as "dealing with defenses of mitigation" and not with complete defenses (Petitioner's petition, at 11). While this Court held that the prosecution must prove every element of a charged offense beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), it did not require the State to:

> prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or severity of the punishment. Patterson, supra at 207 (Emphasis added.)

The Court specifically distinguished affirmative defenses (which do not negate the elements of a crime but rather raise a separate exculpatory issue) from the elements themselves (which constitutionally must be proved by the State):

> Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. Patterson, at 210 (Emphasis added).

Patterson does apply to cases such as the present, in which complete (as well as mitigating) defenses are raised, and does not require that the state prove the non-existence of self-defense. The trial court committed no error in instructing the jury that the defendant, Betty Moran, must prove by a preponderance of the evidence that she acted in self-defense.

This Supreme Court has in fact held that the burden of proving an affirmative defense may be placed on the person asserting the defense. In Leland v. Oregon, 343 U.S. 790 (1952), this Court upheld an Oregon statute requiring the defendant to prove the defense of insanity beyond a reasonable doubt. The standard of proof for self-defense in the instant case, by a preponderance of

the evidence, is by far a less cumbersome burden on an accused than was the burden of proof for insanity approved in Leland.

Additionally, the Sixth Circuit Court of Appeals, following Patterson, held that a defendant may constitutionally be required to prove an affirmative defense. Krzeminski v. Perini, 614 F. 2d 121 (6th Cir., 1980), cert. den., 449 U.S. 866 (1980). In Krzeminski, the defendant attacked the validity of having to prove his defense of insanity. In affirming the conviction, the Sixth Circuit directly applied the Patterson holding:

> Patterson makes it clear that so long as a jury is instructed that the State has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The State may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant.

Krzeminski, at 123 (Emphasis added.)

In the present case, the jury was correctly instructed that the State had the burden of proving every element of the crime beyond a reasonable doubt. Under Patterson, Krzeminski and Davis, therefore, this jury charge was correct. The charge placing the burden of proving self-defense was also correct. Petitioner's conviction should be sustained.

Petitioner was convicted of Murder. The elements of Murder are purposely causing the death of another. By asserting self-defense, one admits a purposeful killing but seeks to justify the act. The defense therefore does not negate any elements of the crime. Therefore, it is constitutionally permissible to require an accused to bear the burden of proof by a preponderance. It was not error to so instruct the jury.

Furthermore, it was not unconstitutional to instruct the jury that Petitioner-defendant had to establish the reasonableness of her actions in order to meet her claim of self-defense. In State v. Melchior, 56 Ohio St. 2d 15 (1978), the Ohio Supreme Court held that to meet a claim of self-defense, the defendant must show he was not at fault in creating the situation giving rise to the affray, that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from the danger was the use of deadly force, and that the defendant did not

violate any duty to retreat. Accord, State v. Robbins, 58 Ohio St. 2d 74 (1979).

Even though the jury may have found the appellant's fears to be reasonable the evidence failed to provide evidence of all three of the elements to the defense at least to the extent that the appellant failed to honor a duty to retreat. In fact, her own testimony indicates she left the room after the argument, thought about the events, re-entered the room and then fired on her husband while he was resting in bed.

The victim had not resumed the argument and, indeed, he did not know she was in the room until after he was shot in the back. The victim never got out of the bed, nor did he draw a weapon on the defendant. If indeed the defendant feared for her life, she had ample opportunity to flee. The jury could properly conclude that the appellant knowingly and purposelfully killed Willie Moran. Therefore, the court's charge was proper and the jury's verdict was consistent with the evidence.

In accordance with Ohio Revised Code Section 2901.05, the court properly instructed the jury as to defendant's affirmative defense of self-defense and defendant's due process rights were not violated by the instruction.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by this Court. The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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SERVICE

A copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari has been mailed this 11th day of June, 1984, to James R. Willis, Attorney for Defendant-Petitioner, Suite 610, Bond Court Building, 1300 East

Ninth Street, Cleveland, Ohio 44114.

George J. Sadd
GEORGE J. SADD
Assistant Prosecuting Attorney

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BETTY MORAN

Petitioner

vs.

THE STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

AFFIDAVIT FOR FILING

I, John T. Corrigan, being first duly cautioned and sworn, depose and say that I am a member of the bar of this Court and otherwise competent to execute this affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the eleventh day of June, 1984, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, one copy of the Petition for a Writ of Certiorari to the Ohio Supreme Court in the above captioned matter. Such mailing was made within the time permitted by this Court for such a filing.

John T. Corrigan

JOHN T. CORRIGAN
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7730

SWORN to before me and subscribed in my presence, this 11th day of June, 1984.

Patricia A. Costello

NOTARY PUBLIC
PATRICIA A. COSTELLO, Notary Public
For the State of Ohio, Cuyahoga County
My Commission Expires June 13, 1987

OPINION

SUPREME COURT OF THE UNITED STATES

BETTY MORAN *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY

No. 83–6759. Decided October 29, 1984

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

Petitioner was convicted by an Ohio jury of the murder of her husband Willie Moran. She asserted at trial that she had acted in self-defense, as a result of the repeated and brutal beatings she had suffered at her husband's hands. She seeks certiorari to review the state appellate court's holding that the jury properly was instructed that she had the burden of proving self-defense by a preponderance of the evidence. According to petitioner, the Due Process Clause forbids the state to punish her for murder when the jury that convicted her may well have thought it as likely as not that she acted in self-defense. I would grant certiorari to consider the substantial constitutional question raised by this petition—a question that this Court has labelled as "colorable" and "plausible" in previous decisions and that has for years divided state courts and lower federal courts.

I

A

There was substantial testimony at petitioner's trial that her husband—a man of violent temperament who virtually always carried firearms and owned a collection of pistols, rifles, and shotguns—had repeatedly beaten and brutalized her. For example, in one incident, Willie Moran "had her by the neck, by the throat, and he was hitting" her with a gun. In another incident, Willie Moran "hit her and knocked her off

the chair and, then, kicked her." Petitioner's mother testified that earlier in the very week in which the murder occurred she saw Willie Moran "hit [Petitioner] and knocked her on the floor, and I seen him take his feet and was kicking her."

On May 15, 1981, petitioner and Willie Moran had their last fight. According to petitioner's testimony, Willie Moran had told her that he wanted some money that he thought she had saved. He threatened that if petitioner did not have the money for him by the time he woke up from a nap, he would "blow [her] damn brains out." Petitioner, who did not have the money, unsuccessfully called a friend for help. Then, realizing that she had no way of raising the necessary funds, she entered the camper where Willie Moran was sleeping, picked up his gun, and fatally shot him.

B

At trial, petitioner pleaded not guilty, asserting that the killing was done in self-defense.[1] Petitioner's theory at trial was that she was a victim of battered woman's syndrome. See, *e. g.*, *L. Walker, The Battered Woman* (1979). Descriptions of this syndrome emphasize the husband's repeated and violent beatings and the wife's dependency—economic and emotional—that make it practically impossible for her to leave. When faced with an immediate threat, victims may be driven to take the lives of their mates as the only possible method of escaping the threat. Although traditional self-defense theory may seem to fit the situation only imperfectly, see Eber, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32 Hastings L. J. 895, 917–931 (1981); Note, *Partially*

[1] Under Ohio law, a murder defendant asserting self-defense must prove "(1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger." *State* v. *Robbins*, 58 Ohio St. 2d 74, 74, 388 N. E. 2d 755, 755 (1979).

Determined Imperfect Self-Defense, 34 Stan. L. Rev. 615 (1982), the battered woman's syndrome as a self-defense theory has gained increasing support over recent years.[2]

The jury at Petitioner's trial was instructed that "the burden of proving the defense of self-defense is upon the defendant. She must establish such defense by a preponderance of the evidence." Petitioner made a timely objection to the instructions on the ground that they unconstitutionally placed the burden of proof on her, rather than on the State.[3] The trial court overruled the objection and the jury returned a verdict of guilty of aggravated murder. The Court of Appeals of the County of Cuyahoga affirmed the conviction and the Ohio Supreme Court dismissed the appeal "for the reason that no substantial constitutional question exists." Petitioner seeks a writ of certiorari to vindicate her Fourteenth

[2] Since the attempt to use battered woman's syndrome as a self-defense theory ordinarily raises only the issue whether the defendant has successfully made out the elements of self-defense in a given jurisdiction, the theory has not been addressed in a great many appellate opinions. But see *e. g.*, *Ibn-Tamas* v. *United States*, 407 A. 2d 626 (DC 1979) (discusing admissibility of expert testimony on battered woman syndrome); *People* v. *Powell*, 102 Misc. 2d 775, 424 N. Y. S. 2d 626 (1980) (same), *aff'd*, 83 App. Div. 2d 719, 442 N. Y. S. 2d 645 (1981); cf. *State* v. *Wanrow*, 88 Wash. St. 2d 221, 234–241, 559 P. 2d 548, 555–559 (1977).

[3] The instructions were given in accordance with Ohio Rev. Code § 2901.05 (1982) ("The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused"). As this statute indicates, the concept of "burden of proof" has two components—burden of production and risk of nonpersuasion. Petitioner's claim here is that the state misallocated the risk of nonpersuasion. There is no doubt that she introduced sufficient evidence to meet whatever burden of production she may have had under state law to come forward with evidence on the issue of self-defense. The issue in this case—and the only issue with which this opinion is concerned—is whether the state may constitutionally place on the defendant the risk of nonpersuasion with respect to self-defense. Cf. *Mullaney* v. *Wilbur*, 421 U. S. 684, 701, n. 28, 702, n. 30 (1975).

Amendment right to have the state bear the burden of proof in a criminal prosecution.

II

A

This Court held in *In re Winship*, 397 U. S. 358 (1970), that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. We noted that this standard "plays a vital role in the American scheme of criminal procedure" and that "[t]he standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.*, at 363 (quoting *Coffin* v. *United States*, 156 U. S. 432, 453 (1895)).

Several years later, we applied the teachings of *Winship* in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). In *Mullaney*, the defendant had been convicted in Maine state court of murder despite his defense of provocation. Under Maine law, as we explained in the opinion,

> "absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder—*i. e.*, by life imprisonment—unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter—*i. e.*, by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years." *Id.*, at 691.

The *Mullaney* trial judge instructed the jury that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id.*, *supra*, at 686. We held that this instruction was constitutionally infirm under the Due Process Clause and our holding in *Winship*: once evidence tending to show provocation was introduced, the state—not the defendant—had to bear the burden of proving beyond a reasonable doubt the absence of provocation.

Two years later, in *Patterson* v. *New York*, 432 U. S. 197 (1977), we applied these principles to the New York murder statutes. The defendant in *Patterson* had claimed that he had committed the murder under the influence of "extreme emotional disturbance" and was therefore entitled to a verdict of manslaughter. The jury found him guilty of murder. New York law provided that the State had to prove only "[t]he death, the intent to kill, and causation" in order to convict a defendant of murder. *Id.*, at 205. If the state met its burden, the defendant could reduce the conviction to manslaughter by proving by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance for which there was a reasonable explanation. We held that—contrary to the situation in *Mullaney*—shifting the burden to the defendant on the issue of extreme emotional disturbance did not violate the Due Process Clause.

Nothing in *Patterson* questions the validity of the *Winship* holding that the burden of proof is on the state to prove beyond a reasonable doubt all of the elements that constitute the crime. Nor is there any doubt that the States have wide discretion in allocating the burden of proof between the prosecution and defense on issues that are *not* elements of the crime. Thus, in order to determine whether a state may allocate the burden of proof on an issue in a criminal prosecution to the defendant, it must first be determined what elements constitute the crime in question; this was the problem in *Mullaney* and *Patterson*. Yet the resolution of those cases left the solution to this problem in some doubt and the lower courts in considerable disarray.[4] The difficulty can be

[4] The Sixth Circuit, for instance, has recently noted the "confusion" in this area in a case dealing with the same claim as that asserted by Petitioner. See *Cherry* v. *Iago*, 722 F. 2d 1296, 1298 (CA6 1983), *cert. denied*,

seen by contrasting *Mullaney*'s insistence that "*Winship* is concerned with substance rather than . . . formalism," *id.*, at 699, with the statement in *Patterson* that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition* of the offense of which the defendant is charged." *Id.*, at 210 (emphasis added). That the Due Process Clause permits the states considerable discretion in defining criminal offenses (and in allocating burdens of proof on matters outside the defined elements of its crimes) is clear. But the *Patterson* opinion did not purport to overrule *Mullaney* and itself recognized that "[t]here are obviously constitutional limits beyond which the States may not go in this regard." *Id.*, at 210. This case presents the opportunity for us to define those limits.

B

Petitioner did not seek to defend herself on the ground of provocation (as in *Mullaney*) or extreme emotional disturbance (as in *Patterson*). Rather, she relied on self-defense as

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—— U. S. —— (1984); see also *Engle*, *supra*, 456 U. S., at 122, n. 23, and n. 40 (citing cases); *Melchior* v. *Iago*, 723 F. 2d 486, 492–493 (CA6 1983) (characterizing identical issue to that of petitioner as "open question"), *cert. denied*, —— U. S. —— (1984); *Thomas* v. *Leeke*, 725 F. 2d 246, 249–251 (CA4 1984) (similar problem under South Carolina law); *Holloway* v. *McElroy*, 632 F. 2d 605 (CA5 1980) (holding that Constitution requires State of Georgia in state murder prosecution to prove absence of self-defense), *cert. denied*, 451 U. S. 1028 (1981); *State* v. *McCullum*, 98 Wash. 2d 484, 656 P. 2d 1064 (1983) (same with respect to State of Washington); *Commonwealth* v. *Hilbert*, 476 Pa. 288, 382 A. 2d 724 (Pa. 1978) (same with respect to State of Pennsylvania); Note, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 Colum. L. Rev. 655, 672 (1978) (self-defense is "major remaining area of uncertainty after *Patterson*"). Of course, the defense of provocation recognized by Maine law in *Mullaney* is but an ancestor of the broader defense of extreme emotional distress recognized by New York law in *Patterson*. See *Patterson*, *supra*, at 107. Given this close relationship between the two defenses, courts and commentators have had difficulty discerning the outlines of the Constitution's commands in this area.

a justification for her action. She asserts that, given the central place of self-defense in Anglo-American jurisprudence and the crucial role it can play in justifying—not merely mitigating—what would otherwise have been a criminal act,[5] the *Winship* doctrine applies with full force to Ohio's allocation of the burden of proof on the issue: the state must prove beyond a reasonable doubt the absence of self-defense in any case in which it is an issue.

Under its most restrictive interpretation, *Patterson* established that the State's definition of an offense within the "four corners" of its murder statute is dispositive on the question of how it may allocate the burden of proof. Even under this reading, it is not clear whether Ohio's practice of placing the burden of proof on the defendant asserting self-defense is constitutional. The Ohio aggravated murder statute states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Ohio Rev. Code § 2903.01(a) (1982). Under Ohio law, an assertion of self-defense requires proof *inter alia* that the defendant "was in *imminent* danger of death or great bodily harm." *State* v. *Robbins*, 58 Ohio St. 2d 74, 74, 388 N. E. 2d 755, 755 (1979) (emphasis added). To place the burden of proof on the defendant asserting self-defense therefore seems to require the defendant to prove he acted when in imminent danger of great bodily harm, and thus to negate the prosecution's burden of proving that the defendant acted "purposely, and with prior calculation and design."

On a slightly broader reading of *Patterson*, sources of Ohio law outside its murder statute may be relevant in determining what elements constitute the crime of aggravated murder in that State. In *Engle* v. *Isaac*, 456 U. S. 107 (1982), respondents sought to review the denial of their habeas petitions, in which they raised virtually the identical claim raised

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[5] See Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 Stan. L. Rev. 615, 630–634 (1982).

by petitioner here.[6] Respondents had been convicted under Ohio's murder statutes, despite their attempt to show self-defense. The Court disposed of the case on the ground that Respondents' failure to raise this claim at trial was a bar to their habeas petitions under *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Nonetheless, the *Engle* opinion noted that both judicial decisions and the Ohio criminal code itself indicate that the State only punishes actions that are voluntary, unlawful, and accompanied by the appropriate *mens rea*. See *Engle*, *supra*, at 121. Self-defense negates these elements of criminal behavior. In the course of proving guilt, the State therefore should be required to disprove the defendant's assertion of self-defense. We characterized this claim as "colorable" and "plausible" in *Engle*. *Id.*, at 122.

These arguments concern the constitutionality of requiring the defendant to prove self-defense within the statutory scheme enacted by the Ohio legislature and interpreted by the Ohio courts. However, lurking in the background is the still more vexing question concerning the scope of the independent constitutional limitations on how the Ohio legislature and courts may define the elements of criminal offenses. Cf. *Patterson*, *supra*, at 210 (noting that "there are obviously constitutional limits beyond which the States may not go in defining crimes"). To assert (as the Ohio appellate court

[6] One Respondent in *Engle* had been convicted of voluntary manslaughter, another had been convicted of murder, and a third had been convicted of aggravated assault. All had based their defenses at trial on self-defense. In addition to *Engle*, this Court has brushed with a similar issue in *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977), decided the same day as *Patterson*. The North Carolina Supreme Court had held that the state law placing the burden of proving self-defense upon the defendant was invalid under *Mullaney*; the North Carolina court nonetheless refused to reverse the conviction because it held that *Mullaney* did not apply retroactively. We reversed on the retroactivity issue, but we did not reach the issue whether "it is constitutionally permissible for a State to treat self-defense as an affirmative defense that the prosecution need not negative by proof beyond a reasonable doubt." *Id.*, at 240, n. 6.

here did) that self-defense is not an element of the crime of aggravated murder is to assert that the State may punish a defendant with life imprisonment (the penalty faced by petitioner) for that offense even if the killing was done in the purest self-defense. Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose "crime," for example, consisted in an immediate response to a murderous attack upon him. See *Patterson*, *supra*, at 210; *Solem* v. *Helm*, —— U. S. —— (1983). If either of these constitutional provisions do so restrict the State, it is difficult to resist the conclusion that absence of self-defense is an element of every aggravated murder charge—an element required by the Constitution even if not by the State's enacted or decisional law. See *Engle*, 456 U. S., at 122, n. 22; Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L. J. 1325, 1366–1379 (1979). Of course, the scope of any such constitutional constraints may never require precise definition, for they find their source in the same notions of fundamental fairness that are at the heart of Anglo-American law and that independently influence the construction and application of Ohio's criminal code. Nonetheless these constraints must be kept in mind in evaluating the state appellate court's decision that petitioner properly bore the burden of proof on self-defense in this case.

III

Petitioner's claim places squarely before the Court the constitutionality of the Ohio allocation of burden of proof on self-defense. It is undisputed that Petitioner introduced evidence tending to prove self-defense at trial. She then interposed a timely objection to the jury instruction allocating to her the burden of proof on the issue.[7] In *Engle* v.

[7] Given some of the problems of fitting Petitioner's battered woman theory within traditional self-defense doctrine, the jury may well have faced a close question as to whether the elements of self-defense were

Isaac, this Court noted the "colorable" and "plausible" nature of claims identical to those of petitioner; claims like hers are certainly sufficiently meritorious to have troubled the courts of appeals and the state courts. I would grant certiorari to address petitioner's "colorable" and "plausible" constitutional claims.

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proven. It is precisely in these circumstances that allocation of the burden of proof can be most significant. Cf. *Winship*, 397 U. S., at 372 (Harlan, J., concurring) (discussing "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958) ("There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conlusion of the trial of his guilt beyond a reasonable doubt").